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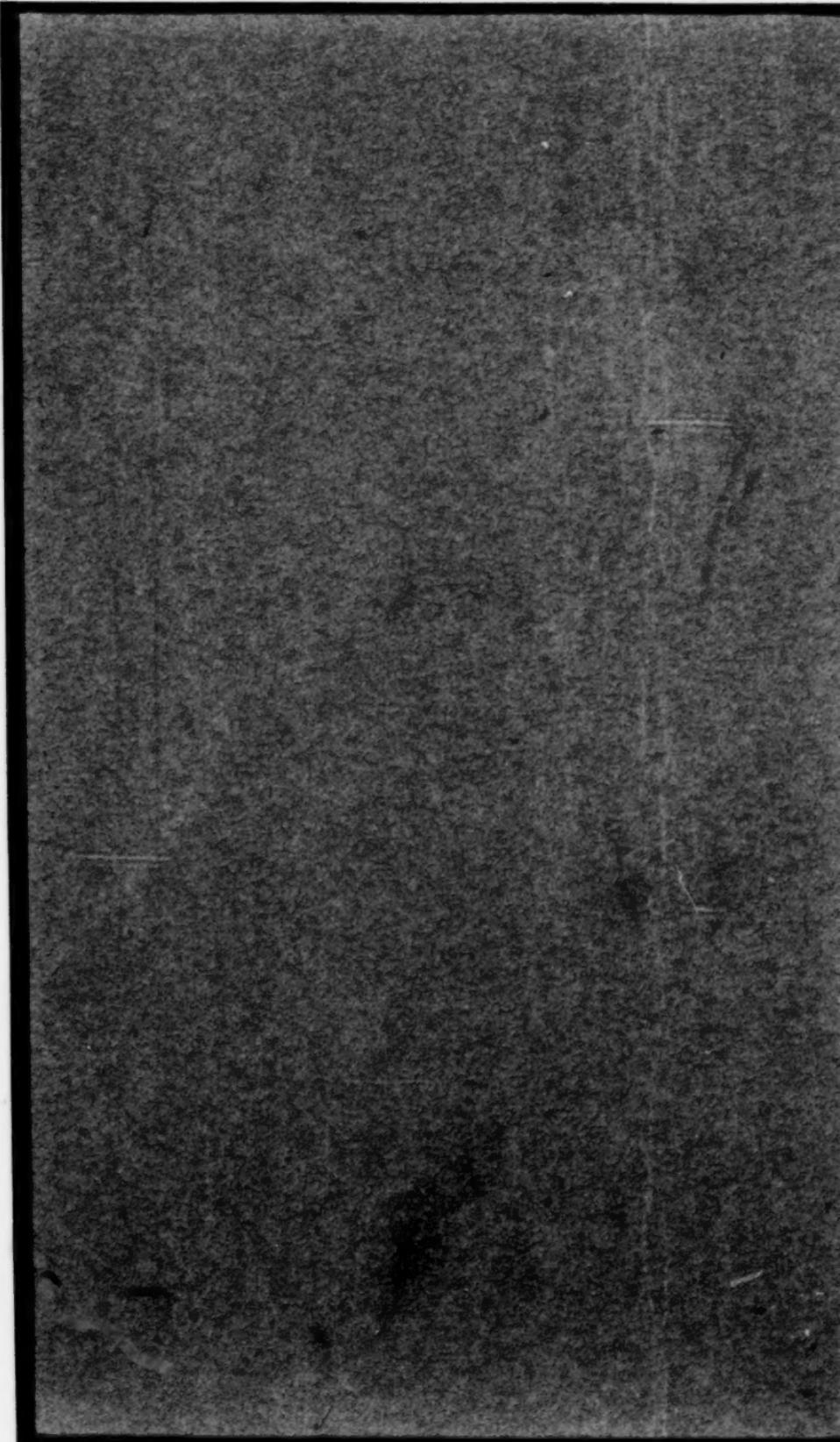
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**THE OHIO PUBLIC DEFENDER COMMISSION  
PLAINTIFF IN CHIEF.**

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(31,600)

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1926

No. 264

THE OHIO PUBLIC SERVICE COMPANY,  
PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO EX REL. JOSEPH O. FRITZ,  
PROSECUTING ATTORNEY OF WAYNE COUNTY,  
OHIO

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 22, 1926

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[fols. a-1] **IN SUPREME COURT OF OHIO****No. 18784**

**THE OHIO PUBLIC SERVICE COMPANY, Plaintiff in Error,**  
**vs.**

**THE STATE OF OHIO ex Rel. JOSEPH O. FRITZ, Prosecuting  
Attorney, Defendant in Error**

**PETITION—Filed September 25, 1924**

Now comes The Ohio Public Service Company as plaintiff in error and for petition in error herein complains of the State of Ohio on relation of Joseph O. Fritz as Prosecuting Attorney, defendant in error, in that said defendant in error at the April term 1924 of the Court of Appeals, in and for the county of Wayne, State of Ohio, recovered a judgment by the consideration of said Court of Appeals against the plaintiff in error in a certain action or proceeding [fol. 2] in quo warranto then pending in said court, wherein the plaintiff in error was defendant and the defendant in error was plaintiff. A copy of said records and proceedings, together with the original pleadings, papers, bill of exceptions and transcript of the docket and journal entries therein duly certified, are filed herewith and made a part of this petition in error.

Said Court of Appeals of Wayne County, Ohio, had original jurisdiction in said action and proceeding in quo warranto and the said cause also involved questions arising under the Constitutions of the United States and of the State of Ohio.

Plaintiff in error avers that there is manifest error in said record and proceedings in said Court of Appeals, prejudicial to said plaintiff in error in this, to-wit:

1st. Because the finding, decision, judgment of the court is not sustained by sufficient evidence.

2nd. Because said finding, decision and judgment are contrary to law.

3rd. Because said finding, decision and judgment of the court constitutes a violation or contravention of the provisions of the Constitution of the State of Ohio and of the Constitution of the United States of America.

4th. The court erred in excluding evidence offered by the defendant, now plaintiff in error, to which said defendant duly excepted.

5th. The court erred in admitting certain evidence offered by the plaintiff, now defendant in error, on the trial of said cause, against the objection of the defendant, now plaintiff in error, and to which action of the court the said defendant below, excepted.

6th. The court erred in overruling defendant's motion for new trial, to which action of the court the defendant duly excepted.

7th. Because the finding, decision and judgment of the court were in favor of the plaintiff when the same should have been in favor of the defendant.

8th. Other errors apparent upon the face of the record.

Wherefore plaintiff in error prays that said judgment of said Court of Appeals may be reversed and that final judgment may be entered herein in favor of the plaintiff in error, and that the judgment of ouster may be vacated and that the defendant herein be adjudged entitled to the exercise of the rights and franchises heretofore used and enjoyed by it, and that plaintiff in error may be restored to all things which it has lost by reason of said judgment of the Court of Appeals, and to recover of the defendant in error its costs herein expended.

The Ohio Public Service Company, Plaintiff in Error, by Franklin L. Maier, C. H. Henkel, Its Attorneys.

[fol. 4] IN COURT OF APPEALS OF WAYNE COUNTY

No. 762

THE STATE OF OHIO on Relation of JOSEPH O. FRITZ, Prosecuting Attorney of Wayne County, State of Ohio, Plaintiff,

vs.

THE OHIO PUBLIC SERVICE COMPANY, a Corporation, Defendant

PETITION—Filed July 21, 1923

The Relator says that he is the duly elected, qualified and acting Prosecuting Attorney of said County of Wayne and State of Ohio; that the defendant is a corporation organized under the laws of the State of Ohio, with a place of business located in the Village of Orrville, said Wayne County, State of Ohio; that the said Village of Orrville is a municipal corporation located in said county of Wayne and State of Ohio; that the said Relator brings this action on behalf of said The State of Ohio, and says:

That the defendant, The Ohio Public Service Company, has taken charge and possession of, as of right, and is now using the public streets, lanes, alleys, avenues, parks and [fol. 5] public places of said Village of Orrville, for the erection and maintenance of poles, wires, guy wires, and electrical equipment for the purpose of supplying private individuals, firms and corporations of said Village, with electricity for commercial and private lighting purposes, and charging and receiving pay for said electricity so furnished.

That said defendant has assumed and used, and is now using, the said franchise rights and privileges, as above enumerated, the same not having been granted to it by any lawful authority, and without the consent or authority of the plaintiff, The State of Ohio, nor/or said, The Village of Orrville.

Wherefore, plaintiff prays that said defendant be compelled to answer to the state authority, by what warrant it claims to use and enjoy the liberties, privileges and

franchises aforesaid; and that it be ousted from using the same.

Joseph O. Fritz, Prosecuting Attorney of Wayne County, State of Ohio. Alton H. Etling, Attorney for Plaintiff. L. R. Critchfield, Attorney for Plaintiff.

[fol. 6] IN COURT OF APPEALS OF WAYNE COUNTY

ANSWER—Filed August 18, 1923

Now comes the respondent, The Ohio Public Service Company, and for answer to the petition herein filed by the Prosecuting Attorney of the County of Wayne, State of Ohio, says:

That it is a corporation organized under the laws of the State of Ohio, duly authorized and empowered to transmit and distribute electrical energy or current in various communities and cities in the State of Ohio, including the Village of Orrville in said state.

That at the time of the filing of the petition herein and ever since its incorporation it has rendered a service to consumers in various communities including the Village of Orrville by virtue of the power and authority granted to it by the State of Ohio as set forth in its articles of incorporation.

That it is a public utility as defined by law and is and has been "engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state," and as stated in the said Village of Orrville.

That the Public Utilities Commission of Ohio authorized this respondent to issue certain securities including stocks and bonds, and recognized the right of this respondent as a public utility to engage in the business of supplying electricity in different communities, including the Village of Orrville, Ohio.

That this respondent did also file with the Public Utilities Commission of Ohio, as provided by law, an application for authority to acquire the property of The Massillon Electric & Gas Company, which application and proceeding was known as #2397 before said Commission,

and that said Public Utilities Commission after a hearing, as provided by law, did, on or about October 12, 1921, authorize The Ohio Public Service Company to increase its capital stock and to issue its preferred stock and create a bonded indebtedness and to acquire all the property and the entire assets of The Massillon Electric & Gas Company; and the respondent did acquire all the property and assets of The Massillon Electric & Gas Company; and formal and legal transfers of all the property of The Massillon Electric & Gas Company, including all its rights, interests, privileges, grants, property and holdings, in the Village of Orrville, Ohio, were made, executed and delivered to The Ohio Public Service Company. And on or about the 29th day of October, 1921, The Ohio Public Service Company did obtain from The Massillon Electric & Gas Company, for a good and valuable consideration, all the right, title and interest of The Massillon Electric & Gas Company in and to certain franchises, rights and privileges in the Village of Orrville, Wayne County, Ohio, and especially all right, title and interest in and to the franchise granted to Ansel P. Gans and Melville D. Wilson, their associates and assigns on February 1st, 1892, by the Council of said Village.

This respondent further says that since the acquisition of such rights, privileges and property it has used and enjoyed the same and has continued to serve the consumers in said community without any protest or complaint made [ffol. 8] to The Public Utilities Commission of Ohio or any other complaint or interference by the said municipality, the Village of Orrville, Ohio, or the inhabitants thereof, other than that hereinafter set forth. That the respondent and its predecessors have at all times since February 1st, 1892, used and enjoyed all the rights, privileges and franchises under and created by an ordinance passed by the Village of Orrville on February 1st, 1892, granting to the said Ansel P. Gans and Melville D. Wilson, their associates and assigns, the right to use the streets, lanes, alleys and avenues of said Village "for the purpose of erecting, maintaining electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power."

The respondent says that The Massillon Electric & Gas Company was a corporation organized under the laws of the State of Ohio and a public utility operating therein, as provided by law, and that the said The Massillon Electric & Gas Company did furnish service to the said Village of Orrville, Ohio, and the inhabitants thereof prior to October 29, 1921, and that said Village of Orrville, Ohio, did recognize the rights of The Massillon Electric & Gas Company to so operate in said Village and to use the streets, alleys, lanes and public grounds of said Village for such purposes.

And this respondent further avers that on or about September 25, 1912, the said The Massillon Electric and Gas Company did file a joint application with The Orrville, Light, Heat & Power Company, as provided by law, with the Public Utilities Commission of Ohio, asking for the [fol. 9] purchase and sale of the property of The Orrville Light, Heat and Power Company, which consisted of all the necessary poles, wires, equipment and machinery for the operation of a light, heat and power plant in the Village of Orrville, Ohio; and that The Public Utilities Commission of Ohio did make an order on or about the 23rd day of October, 1912, authorizing the Orrville Light, Heat & Power Company to sell and The Massillon Electric & Gas Company to purchase said plant of The Orrville, Light, Heat & Power Company and all the assets and the entire property thereof, including all privileges, rights, grants and franchises; and in accordance therewith one D. I. Rennecker, on behalf of and as the successor to The Orrville Light Heat & Power Company, by formal and legal transfer did convey to The Massillon Electric & Gas Company all of the property and entire assets of *the* The Orrville Light Heat & Power Company, including franchises, rights and privileges, which deed of conveyance was executed, in conformity to the order of The Public Utilities Commission of Ohio, on the 11th day of March 1912, and which deed of conveyance was duly recorded in the deed records of Wayne County, Ohio, Volume 168 page 15 et seq. That the said D. I. Rennecker had received by proper deed of transfer all the property, right, franchises and assets of The Orrville, Light, Heat & Power Company on July 1st, 1907; and that from said date until the transfer to The Massillon Electric & Gas Company, the said D. I. Rennecker operated said property in the Village

of Orrville, Ohio, under the name of The Orrville Light Heat & Power Company; which deed of conveyance was [fol. 10] recorded in the deed records of Wayne County, Ohio, Volume 156 page 213 et seq.

The respondent further avers that prior to the 1st day of July, 1907, The Orrville Light, Heat & Power Company, a corporation organized under the laws of the State of Ohio, used and enjoyed the rights, grants, and privileges of said ordinance passed by the council of the Village of Orrville, Ohio, on February 1st, 1892, and was engaged in distributing electrical energy and current for light, heat and power purposes in said village. That said corporation was organized on January 3, 1893, and that said corporation acquired all the rights, interests and property of the said Ansel P. Gans and Melville D. Wilson, including all rights, grants and privileges under the ordinance passed by the Village of Orrville, Ohio, on February 1st, 1892.

That at various times after February 1st, 1892, the Village of Orrville, Ohio, did enter into contracts with the various parties and corporations hereinbefore referred to, for street lighting, and said Village of Orrville did at all times recognize the right of each party hereinbefore named to use and enjoy the streets, alleys, lanes and avenues of said Village for the distribution of electricity, or electrical energy, for light, heat and power purposes. That the use and enjoyment of said streets has, since 1892, been open and notorious and has been without objection or interference from the said Village or the officials thereof, other than that hereinafter set forth, and that the respondent and its predecessors have always enjoyed the rights, privileges and franchises of using said streets. And are still entitled [fol. 11] to the right to use and enjoy all of such privileges, grants and franchises.

The respondent further avers that section I of said ordinance passed by the Council of the Village of Orrville, Ohio, on February 1st, 1892, provided as follows:

“That Ansel P. Gans and Melville D. Wilson of Canal Dover, Ohio, their associates, successors and assigns, are hereby authorized and empowered to use the streets, lanes, alleys and avenues of the Village of Orrville, Ohio, for the purpose of erecting, maintaining, electric wire mains, and

apparatus complete for the distribution of electricity for light, heat and power."

That as averred the said Gans and Wilson and their successors from and after said first day of February, 1892, and up to the time of the filing of the petition herein, and now have and are using and enjoying all the rights, grants and privileges under said franchise and ordinance. That said ordinance has not been legally repealed and said section has not been legally modified or amended and is still in full force and effect. That such ordinance created a contractual relation between said Village and this respondent and its predecessors. That the rights existing under and arising from such ordinance and contractual relation are of great value. That this respondent and its predecessors, relying upon such ordinance and contractual rights, expended large sums of money in the erection, construction, maintenance and operation of its lines, apparatus, equipment, etc., in said Village of Orrville.

[fol. 12] That said Village of Orrville, Ohio, has not in any legal manner (notwithstanding its attempted action) terminated said grant and has not fixed or determined the period for which the same was allowed, but has at all times permitted the said Gans and Wilson and their successors to use and enjoy the same, and that the said Gans and Wilson and their successors have at all times continued in the use and enjoyment thereof and have not terminated the same.

The respondent further avers that The Massillon Electric & Gas Company brought an action in the Common Pleas Court of Wayne County, Ohio, being cause #24440 against the Village of Orrville, Ohio, and certain officials thereof, seeking to permanently enjoin the defendant from operating a municipal electric light plant. That, in said action, the Village of Orrville filed an answer in which it recognized that the plaintiff had certain property in said Village which it was using for light and power purposes; this cause was carried to the Court of Appeals of Wayne County, Ohio, and was there known as cause #637. The Court of Appeals recognized that The Massillon Electric & Gas Company, the predecessor of the respondent, was operating in said village with authority. The said Village did not in any way question the right or authority of said predecessor of the respondent to so operate as a company distributing

electricity and electrical energy for heat, light and power purposes.

The Massillon Electric & Gas Company commenced another proceeding in the Common Pleas Court of Wayne County, Ohio, wherein The Massillon Electric & Gas Com-[fol. 13] pany, as a taxpayer, was plaintiff, and the Village of Orrville, et al., were defendants, which cause was #24458. Plaintiff averred that it owned and operated an electric works and plant in said Village and that it had supplied electricity for light and power purposes in said Village, both for public and private use; that the Village of Orrville filed an answer in said cause in which it admitted that the said The Massillon Electric & Gas Company was engaged in business in the Village of Orrville. Said cause was taken to the Court of Appeals, Wayne County, Ohio, and was there known as cause #638. The Court of Appeals of Wayne County, Ohio, found that The Massillon Electric & Gas Company was the owner of a plant in said Village and operated same under a franchise granted by said Village and further found "no defense is made that the franchise has terminated."

The respondent further avers that the Dravo-Doyle Company brought an action against The Village of Orrville, in the Court of Common Pleas, Wayne County, Ohio, being cause #24618. The said Village filed an answer therein referring to cause #24440 commenced March 12th, 1914, and made a part of its answer the decree of the Court of Appeals in cause #637 and also referred to cause #24458 commenced on or about April 3rd, 1914, and made a part of its pleading a copy of the decree of the Court of Appeals in #638. And further averred that "The Massillon Electric & Gas Company, did in fact own and was operating an electric light plant in said Village of Orrville under a franchise duly granted to it, and that said franchise had [fol. 14] not then expired, and that said The Massillon Electric & Gas Company was then supplying from said plant electricity to the Village of Orrville and the inhabitants thereof for light and power purposes, both public and private."

That this cause was finally taken to the Supreme Court of Ohio, being cause #14917 in said court, and said court

in announcing its decision recognized that The Massillon Electric & Gas Company had certain rights and that "on July 21st, 1913, and prior thereto The Electric & Gas Company, an Ohio corporation, owned an electric light plant in the Village and was furnishing electricity to said Village and the inhabitants thereof for both public and private light under a franchise granted by said Village in 1892, and such franchise had not yet expired.

The Supreme Court also found "a franchise was granted in 1892 and fixed the contractual rights and duties of the parties."

Respondent further avers that it has certain fixed and valuable rights in said Village and that it has expended large sums of money in attempting to provide a service for the said Village and the inhabitants thereof and that its contractual, franchise and other rights have never been legally terminated, abandoned, relinquished or legally annulled, and that it is entitled to the full use and enjoyment of all the same.

Respondent further avers that on or about the 18th day of June, 1923, the Village, through its Council, attempted to repeal said ordinance of Feb. 1, 1892, and on the same date caused a resolution to be passed by said Village Council notifying The Ohio Public Service Company of the [fol. 15] attempted termination of said franchise and directing it to remove all of its poles, wires, guy wires, cross arms, insulators and other electrical equipment occupying the streets, lanes, alleys, avenues and public places of said Village within thirty days from the receipt of a copy of said resolution, and it was directed therein that said resolution be served upon the respondent herein by the Mayor of said Village of Orrville.

Respondent further says that the action of said Village Council in attempting to annul said ordinance is wholly unauthorized and illegal, and was passed by said Village for the purpose of forcing the plaintiff from the streets and other public places of said municipality and to thus eliminate said respondent as a competitor of the municipally operated electric lighting plant of said Village.

This respondent avers that it has certain fixed and valuable rights in said Village and that it has expended large sums of money in attempting to provide a service for the

said Village and the inhabitants thereof, and that its contractual, franchise and other rights have never been terminated, abandoned, relinquished or annulled, and that it is entitled to the full use and enjoyment of all of the same.

That the action of the State of Ohio and the Village of Orrville to deprive respondent from further use and enjoyment of its rights and to oust it from the enjoyment thereof, will impair the obligation of the contract and grant of February 1st, 1892, and destroy and make worthless the value of respondent's property used and useful for furnishing [fol. 16] electricity for light, heat and power purposes in said Village. That the action so attempted by the State of Ohio and the Village of Orrville is without authority of law and violative of the provisions of the Constitution of the State of Ohio, and especially Article I, Section Nineteen thereof, and Article II, Section Twenty-eight thereof, and of the Constitution of the United States of America, and especially Article I, Section Ten thereof, and Section One of the Fourteenth Amendment thereto.

Wherefore respondent says that it does not usurp or without warrant or authority use or exercise any of said franchises, rights and privileges, but avers that the same have been granted to it by lawful authority and have been exercised by it with the consent and recognition and authority of the State of Ohio and the Village of Orrville, and the attempted action on the part of said Village was without warrant or authority in law and as herein averred violative of law and Constitutional provisions, and respondent asks that the petition herein be dismissed and that it be protected in its rights and the use and enjoyment thereof and that it recover its costs herein and for such other relief as may be just and right in the premises.

The Ohio Public Service Company, by Carl Henkel and Franklin L. Maier, Attorneys.

(Duly verified.)

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[fol. 17] IN COURT OF APPEALS OF WAYNE COUNTY

REPLY—Filed January 28, 1924

Now comes the Relator and for reply to the answer of the respondent says:

That he admits the allegations of the second paragraph of said answer of the respondent, but denies that the organization of said corporation, or the authorization as set forth in said paragraph, gives to the respondent any franchise rights as claimed by the respondent, in said Village of Orrville.

The Relator further admits the allegations of the third paragraph of the answer of the respondent, but denies that any such service rendered by virtue of the power and authority granted by the State of Ohio gives to the respondent any franchise rights in said Village of Orrville, Ohio.

The Relator admits the allegations of the fourth paragraph of said answer.

The Relator admits the allegations of the fifth paragraph of said answer relative to the issuing of certain securities, but denies that by virtue of the facts stated in said fifth paragraph, the respondent acquired any franchise rights in said Village of Orrville, Ohio.

The Relator further admits the allegations of paragraph 6 of the respondent's answer relative to an application for authority to acquire the property of The Massillon Electric and Gas Company; but denies that respondent obtained all the right, title and interest in and to the franchise [fol. 18] granted to said Ansel P. Gans and Mellville D. Wilson, their associates and assigns; and further says that if they did acquire such alleged rights as set forth in said 6th paragraph, that by virtue of said acquisition, said The Massillon Electric and Gas Company had no franchise rights in said village to transfer to respondent at the date of said alleged acquisition and respondent has now no franchise rights as claimed in said paragraph 6 by the respondent, in the Village of Orrville, Ohio.

The Relator denies the allegations of the 7th paragraph of the answer of the respondent, and further says that at the time of and before the expiration of a certain contract ordinance by virtue of which one D. I. Rennecker entered into a contract with said Village of Orrville, Ohio, to furnish public and private lighting for said village up to July 15, 1917, the said Village of Orrville refused to enter into any contract with said The Massillon Electric and Gas Company for the furnishing of public or private lighting in said village after said July 15, 1917, and that by virtue of said refusal all contract rights between the said Vil-

lage of Orrville, Ohio, and said D. I. Rennecker, alleged to have been assigned to the said The Massillon Electric and Gas Company were terminated, and that by virtue of said alleged contract theretofore existing between said village and said The Massillon Electric and Gas Company said The Massillon Electric and Gas Company no longer furnished public lighting to said Village of Orrville; the consideration as recited in said franchise as granted Feb- [fol. 19] ruary 1st, 1892, by which the said Gans and Wilson, their successors and assigns, had a right to use said streets, lanes, avenues and public places having failed.

And the Relator further says that if the Respondent claims that the said The Massillon Electric and Gas Company became the assignee of the contract ordinance entered into by and between said Village of Orrville and one D. I. Rennecker, said contract ordinance to begin on July 15, 1912; and ending five years from said time, to-wit, on July 15, 1917, and if it is claimed that the said contract ordinance was granted and that the use of the streets under said contract ordinance was by virtue of said ordinance of February 1st, 1892, which defendant denies, then and in that event the said relator says that said The Massillon Electric and Gas Company violated and abandoned whatever contract or franchise rights were so obtained from said D. I. Rennecker by its failure to carry out and fulfill the conditions of said franchise of February 1st, 1892, or said contract ordinance of July 15, 1912, in that it failed to supply current and public lighting in accordance with either said last mentioned contract ordinance, or said franchise of February 1st, 1892; that both said ordinances provided for the manufacture and supply of electricity from a plant located within the said Village of Orrville, Ohio, and that said The Massillon Electric and Gas Company abandoned said manufacturing plant in said village and conducted or attempted to conduct electricity into said village from outside said village, as hereinafter stated; that by reason thereof the service furnished by said The Mass- [fol. 20] sillon Electric and Gas Company was unsatisfactory and inefficient and in violation of the terms of said contract ordinance granted said D. I. Rennecker as well as of the said franchise of February 1st, 1892; that on account of the violation of the terms of said contract ordinance and said franchise, said village refused to enter

into the contract for the supplying of any lighting, public or private, in said Village of Orrville to begin after said July 15th, 1917; and that the use of the streets, lanes, alleys, avenues and public places of said Village or Orrville by said The Massillon Electric and Gas Company and respondent for the distribution of electric current, either public or private, has been in violation of the terms and conditions of said contract ordinance and said franchise without any right or authority to either said The Massillon Electric and Gas Company or respondent whatsoever except the mere sufferance of said Village of Orrville.

As to the 8th paragraph of respondent's answer, Relator denies that the said The Massillon Electric and Gas Company furnished service to said Village of Orrville, Ohio, prior to October 29, 1921, and after July 15, 1917; and denies that the said The Massillon Electric and Gas Company furnished a service to the said Village of Orrville, or the inhabitants thereof, by virtue of any franchise or contract whatsoever, and further says that what service was rendered at any time by said The Massillon Electric and Gas Company was done by mere sufferance of said village.

The Relator for want of knowledge and information as to the allegations of the 9th paragraph of respondent's [fol. 21] answer denies each and every allegation thereof and says that if said order was made by the Public Utilities Commission, as therein alleged, that said Public Utilities Commission had no power to make the same and the same was null and void.

Relator for reply to paragraph 10 of said answer of the respondent says: That the said Orrville Light, Heat and Power Company used and enjoyed only the rights, grants and privileges granted to it by virtue of contracts entered into in 1902 and 1906 by and between the said Village of Orrville and said the Orrville Light, Heat and Power Company and the implied power granted under said contracts to use the streets, lanes, alleys and avenues and public places of said village for the purpose of carrying out said contracts; and the relator denies all the remaining allegations of said paragraph 10 in said answer.

As to the allegations of paragraph 11 of the respondent's

answer, the Relator admits that at various times after February 1st, 1892, the Village of Orrville did enter into contracts with the various parties and corporations hereinbefore referred to, except said The Massillon Electric and Gas Company and respondent, for street lighting, but avers that the last of said contracts expired on the 15th day of July, 1917. The relator denies that said Village of Orrville did at all times recognize the rights of each of the parties to said franchise of February 1st, 1892, to use and enjoy the streets, lanes, alleys and avenues of said village for the distribution of electricity. The Relator admits that [fol. 22] the respondent and its predecessors had open and notorious use and enjoyment of the streets of said village from 1892 to July 15, 1917, but avers that there was objection to the manner of service in said streets long prior to July 15, 1917, and after 1912, and that there was objection to use of said streets, after July 15, 1917. Relator further avers that the use of said streets, since July 15, 1902, has been without any express franchise rights so to do; and denies that respondent is still entitled to the right to use and enjoy all such privileges and rights and franchises.

As to paragraph 12 of said answer, the said Relator admits the section of the ordinance of February 1st, 1892, as set forth in said answer, and attaches hereto as a part of this said reply a full copy of said ordinance of February 1st, 1892, marked "Exhibit A", and makes the same a part hereof; and denies the remaining allegations of said paragraph 12, except that relator admits that such ordinance created a contractual relation between said Village of Orrville and said Gans and Wilson and their successors and assigns.

In reply to paragraph 13 of said answer the Relator denies each and every allegation of said paragraph 13.

The Relator replies to paragraphs 14, 15, 16, 17 and 18 of said Answer relating to causes of action numbers 24440, 637, 24458, 638, 24618 and 14917, says these causes of action were all concerning facts that existed or were alleged to exist prior to July 15, 1917, and that the petitions in all of said causes of action were filed before said date and in none of said cases was the question of the extent and duration [fol. 23] of said franchise of February 1st, 1892, specifically

in issue, and that the duration and extent of said franchise has never been determined by any court within the State of Ohio, up to the present time.

The Relator says in reply to paragraph 19 of said Answer that he denies each and every allegation of said 19th paragraph.

Relator says in answer to paragraph 20 of said answer that on the 18th day of June, 1923, the Council of the Village of Orrville, Ohio, duly and legally passed an ordinance repealing said ordinance of February 1st, 1892, and said ordinance was duly and legally repealed on said date; and that on said same date said Council passed a resolution, being a notice to the Respondent herein of the termination of said franchise of February 1st, 1892, and to remove its poles, lines, wires, guy wires, cross arms and all electrical equipment from the streets, lanes, alleys, avenues and public places of the Village of Orrville, Ohio, and provided therein that a copy of said resolution be served upon said The Ohio Public Service Company by the Mayor of the Village of Orrville, and that on the 19th day of June, 1923, the Mayor of said Village, to-wit, E. L. Kinney, duly served a copy of said resolution upon the Respondent, The Ohio Public Service Company, that said resolution was duly and legally passed; that said resolution called upon Respondent to vacate said streets, lanes, alleys, avenues and public places of said Village within thirty (30) days from the service of a copy of said notice [fol. 24] upon said Respondent, and that in response thereto said Respondent refused, and does still refuse, to obey the orders of said Council as embodied in said resolution. A copy of said resolution, marked "Exhibit B", and a copy of said repealing ordinance, marked "Exhibit C", are each hereto attached to this Reply and made part thereof.

Relator further says that by virtue of said ordinance, Exhibit C, and said resolution, Exhibit B, said Council of said Village of Orrville legally elected to terminate, and did terminate, said ordinance of February 1st, 1892, and any and all contractual relations existing thereunder.

Relator says in reply to paragraph 21 of said Answer that he denies each and every allegation thereof.

In reply to paragraph 22 of said Answer the Relator says that he denies each and every allegation thereof.

As to paragraph 23 of said answer the Relator says he denies each and every allegation thereof.

In answer to paragraph 24 of said Answer the Relator says he denies each and every allegation thereof so far as the same are statements of fact, and says that said Respondent has no rights in said Village of Orrville, as alleged in said paragraph 24.

The Relator further says in reply to the Answer of the Respondent that the said ordinance of February 1st, 1892, provided that the said Ansel P. Gans and Mellville D. Wilson, their successors and assigns should erect, maintain and operate an electric lighting plant for the manufacture [fol. 25] of electricity in said Village of Orrville, Ohio; that some time after the beginning of the last contract ordinance in 1912 and before July 15, 1917, the exact date thereof Relator does not know, the said The Massillon Electric and Gas Company abandoned the said electric lighting plant and dismantled the same and ceased thereafter to use the same; that at the filing of the petition in this case and at the present time said electric lighting plant is in a state of dilapidation, decay and abandonment, the windows broken out, the doors standing open and said building simply used as a storehouse for junk; that as the result of said abandonment of said electric lighting plant and ever since said abandonment the service to the people of Orrville, Ohio, has been poor, unsatisfactory and inefficient, that the street lights have gone off and out for periods longer or shorter and occurring at times unknown to the inhabitants of said Village, previous to the occurrence, causing great inconvenience and annoyance; that since the abandonment of said plant the said Respondent and its predecessor, The Massillon Electric and Gas Company, have attempted to conduct electricity into said Village of Orrville from a high tension voltage wire not running in or through said Village of Orrville, said high tension voltage wire being built for the purpose of conducting electricity from its source of manufacture in Massillon, Ohio, and later near the Ohio River, as Relator is informed, up to the City of Massillon, Ohio, thence west through various and numerous villages, including Dalton, Smithville, Apple Creek, Wooster, Fredericksburg and Shreve and other

[fol. 26] towns; that the supply of electricity to the Village of Orrville since the abandonment of said plant has been intermittent and uncertain; that during said period up to July 15, 1917, many complaints were made to said The Massillon Electric and Gas Company of its service and since to The Ohio Public Service Company, concerning its service in the Village of Orrville and the supplying of electricity therein; that during the period of the last contract price ordinance, from 1912 to 1917, many deductions from the contract price to D. I. Rennecker and his alleged successor, The Massillon Electric and Gas Company, were made from its bills by the Village of Orrville, due to outages in its street lighting system.

The Relator says that by the abandonment of said electric manufacturing plant in the Village of Orrville by the said Respondent and the said The Massillon Electric and Gas Company, they have broken the terms of said contract, breached its conditions and forfeited all rights therunder before and up to and at said July 15, 1917.

Relator further says in reply to said Answer that by the terms of said ordinance of February 1st, 1892, the consideration of the use of the streets, lanes, alleys, avenues and public places to said Gans and Wilson, their successors and assigns, was the furnishing of light to said Village of Orrville, Ohio, for the period of ten (10) years, as stated in said ordinance; that thereafter contracts were made at various times by other and independent contractors, the final contract of which expired on July 15, 1917; that the right of said Gans and Wilson, their successors and assigns, to furnish and sell electricity to private consumers in said [fol. 27] Village of Orrville was not specifically granted in said ordinance of February 1st, 1892, if granted at all, but that said right, if any existed, was ancillary to and a mere incident of the main right to light the streets of said Village of Orrville; that said right whatever it may be, if any, to furnish electricity to private consumers of said Village, and receive pay therefor, expired, by implication, with the expiration of the main right and contract to light the streets of said Village; that it was not contemplated by said Village of Orrville and said Gans and Wilson, their successors and assigns, that an independent right was being granted to said Gans and Wilson to use the streets of said

Village for private lighting purposes but the only contemplation and agreement of parties, as afore stated, that is the right to furnish electricity to private consumers, was incidental and ancillary to the main right granted, that of public lighting.

The Relator for further reply to the Answer of the Respondent says that if the court should find that said ordinance of February 1st, 1892, did not expire by virtue of its own terms and the reasons above stated on July 15, 1902, or July 15, 1917, or that rights under the said ordinance were not violated and forfeited by the breach of said contract as hereinbefore stated and that Respondent had rights under said ordinance of February 1, 1892, and if the court should further find that said franchise of February 1st, 1892, did not contain within itself or fix the terms of its duration and that the same was indeterminate, then this Relator says that said ordinance was terminable at [fol. 28] the will of said Village of Orrville and Relator further says that on June 18, 1923, said Village of Orrville elected to terminate said franchise and all rights thereunder and proceeded to do so by virtue of the ordinance passed on said date repealing said ordinance of February 1st, 1892, and by virtue of said notice contained in said resolution of said date and the service of the same upon the Respondent herein, The Ohio Public Service Company, on July 19, 1923, as hereinbefore stated; and that by virtue of said resolution and said ordinance and notice Relator says said franchise has become null and void and the same is of no effect in law and confers no rights upon the said Respondent to further use the streets, lanes, alleys, avenues and public places of said Village of Orrville for the erection and maintenance of its poles, wires, guy wires, and electrical equipment for any purpose since said date of June 19, 1923.

The Relator further says in Reply to said Answer of the Respondent that he denies that at the time of the filing of this said action and at the present time that the Respondent has a large sum of money invested in said Village of Orrville, Ohio, in its poles, wires, cross arms, plant and electrical equipment and says the facts are that at the time of the filing of this petition the whole property of the Respondent in said Village of Orrville was in a state of dilapi-

dation, decay and abandonment or partial abandonment; that its poles, wires and equipment for public lighting has been absolutely abandoned since July 15, 1917, and that many of the poles used for said purpose have broken down and have been taken away, that many of the said poles [fol. 29] have no equipment thereon, that many of said poles are leaning now and in a dangerous condition, the wires hanging from poles and the insulation on many such wires as now exist hanging in strips from one to two feet in length, that said wires that are remaining on said poles are in the way of and an obstruction to the wires that are in use by various telephone and electric companies in said Village, and that its whole system has become and is dangerous and a nuisance and the same should be abated as a nuisance, dangerous to the life and limb of the inhabitants of said Village; that said Respondent has but a very few private consumers in said Village, to the best knowledge and belief of the Relator not to exceed nine (9) or ten (10) customers for commercial and private purposes, who use a small amount of electricity, and not to exceed two residence homes in said Village; that an appraisal of the valuation of said property would show but a small investment at the present time; that the said former municipal electrical manufacturing plant, as afore stated, is in a state of dilapidation and worthless, but for its value as real estate and a small price for the small building thereon, independent of its use for manufacturing electricity; that the total value of money now invested by said Respondent in said Village of Orrville under any claimed right under the franchise of February 1st, 1892, or in any other way is but small, by virtue of the facts above stated.

Relator says that it denies each and every allegation of said Respondent's Answer not herein expressly admitted, qualified or denied.

[fol. 30] Wherefore, said Relator renews the prayer of his said petition without rewriting the same herein.

Joseph O. Fritz, Prosecuting Attorney, Wayne County, State of Ohio. Alton H. Etling, Attorney for Relator. L. R. Critchfield, Attorney for Relator.

## EXHIBIT A TO REPLY

An Ordinance (Vol. 1, Pages 33-34-35-36)

**Providing for Electric Lights, Heat, and Motive Power in  
the Village of Orrville, Wayne County, Ohio**

Be it ordained by the Council of the Village of Orrville,  
and it is hereby ordained:

Sec. 1. That Aurel P. Gans and Mellville D. Wilson of Canal Dover, Ohio, their associates, successors and assigns are hereby authorized and empowered to use the street, lanes, alleys, and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power.

Sec. 2. Said Gans and Wilson, in the construction of their plant or in conducting their wires for the distribution [fol. 31] of electric current, shall not unnecessarily intercept or obstruct the passage of any street, alley, lane or avenue or other thoroughfare in said Village, crossing same shall not unnecessarily mutilate, cut or trim any tree or trees except for the safe conduct of said electric wires, and same shall be fully protected from any and all damages where such trimming is necessary to be done. Same shall erect said wires and poles not less than thirty feet long and placed in the ground at a sufficient depth to insure perfect safety.

Sec. 3. In consideration of the privileges hereby granted the said Gans and Wilson, their associates, successors and assigns shall furnish the Village of Orrville on the several streets, lanes, alleys and avenues not less than twenty-five (25) electric lamps of not less than 2,000 candle power each, to be placed wherever the Council may direct in said Village of Orrville, said lamps to burn and be lighted and extinguished according to what is known as "Moonlight Schedule," until 1 o'clock and in addition then to be lighted whenever the moon is obscured and on rainy and stormy nights, whenever same occurs outside the regular lighting hours.

Sec. 4. In consideration of the construction of said electric light plant as herein provided, the Council of said Village of Orrville hereby agrees and binds itself to take and use the light of said Gans and Wilson, their associates, successors and assigns for the period of ten (10) years from and after the date upon which said light shall be first supplied and to pay same quarter-annually for said lighting a price equal to seventy-two (\$72.00) dollars per year for [fol. 32] each and every lamp of 2,000 candle power, said lamps to be lighted and extinguished and kept in repair by and at the expense of said Gans and Wilson, their associates, successors and assigns; the total number of lamps thus supplied to be not less than twenty-five 2,000 candle power lamps—are light.

Sec. 5. Said Gans and Wilson shall commence work on said electric light plant after the passage of this ordinance at such time as to have same completed by May 1st, 1892, otherwise the ordinance will be null and void, the privilege and franchise hereby granted shall be declared forfeited and the obligations of the Village annulled. ~~~~~

Sec. 6. The privilege hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of said Gans and Wilson to perform any of the conditions hereby imposed where such failures are occasioned by accident, untoward events or the want of necessary repairs to the machinery or apparatus of said electric light plant, provided such accidents be remedied and repairs made within a reasonable time and a pro rata reduction be made to the said Village of Orrville, for any loss of lighting occasioned thereby.

Sec. 7. Said Gans and Wilson agree to accept this ordinance and to notify the Council in writing of such acceptance within ten days from the passage hereof, which acceptance, together with the ordinance, shall constitute a contract, otherwise the Village shall be no longer bound thereby and said ordinance shall be void.

Sec. 8. All other ordinances heretofore passed pertaining [fol. 33] to and providing for electric lights, heat and motive power by means of electricity, and all ordinances granting franchise for the erection and operation of electric wire

mains for the distribution of light, heat and motive power are hereby repealed.

Passed and adopted February 1, 1892.

M. R. Zell, Clerk.

A. N. Brenneman, O. D. Braden, J. W. Stansbury, Ordinance Committee.

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#### EXHIBIT B TO REPLY

#### Resolution

Notice to the Ohio Public Service Company of termination of Franchise granted February 1, 1892, to Aurel P. Gans and Mellville D. Wilson, their associates, successors, and assigns, and to remove its poles, lines and equipment, wires, guy wires, cross-arms, and all electrical equipment from the streets, lanes, alleys, avenues, and public places of the village of Orrville, Ohio.

The Council of the Village of Orrville, Ohio, not waiving their claim that said rights, privileges and franchises granted to Aurel P. Gans and Mellville D. Wilson, their associates, successors and assigns, including The Ohio Public Service Company, ceased and terminated on the 15th day of July, 1917, and not waiving the claim of said Village of Orrville, that said associates, successors and assigns of said Gans and Wilson, including said The Ohio Public [fol. 34] Service Company, have forfeited all rights, privileges and franchises granted by an ordinance of the Village of Orrville, Ohio, passed on the first day of February, 1892, and recorded in Volume I, page 32, of the Ordinance Records of said Village of Orrville, by reason of the abandonment of said rights, privileges and franchises and by not performing the terms and conditions of said franchise; and

Whereas, The Ohio Public Service Company claim to be the successors of Aurel P. Gans and Mellville D. Wilson to all the rights, privileges and franchises granted to said Gans and Wilson by virtue of said ordinance of the Village of Orrville, passed on the first day of February, 1892, and recorded in Volume I, page 32, of the Ordinance Records of said Village of Orrville, Ohio; and

Whereas, said ordinance does not specify the length of duration of said franchise; and

Whereas, said ordinance has been repealed by said Council;

Now, Therefore, be it resolved by the Council of the Village of Orrville, State of Ohio:

Section 1. That all rights, privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including said The Ohio Public Service Company, be and the same are hereby terminated and ended.

Section 2. That the said The Ohio Public Service Company are hereby notified to remove all of their poles, wires, guy wires, cross arms, insulators and other electrical equipment now occupying the streets, lanes, alleys, avenues, and [fol. 35] public places of said Village of Orrville, Ohio, within thirty (30) days from the receipt of a copy of this resolution.

Section 3. That a copy of this resolution be served upon said The Ohio Public Service Company by the Mayor of said Village of Orrville.

E. L. Kinney, Mayor.

Passed June 18, 1923. Attest: A. Jenny, Clerk.

Return of the Mayor

I hereby certify that I served a copy of the above resolution upon — —, agent in charge of the Ohio Public Service Company at Orrville, Ohio, at their office in said Village of Orrville, on the 19th day of June, A. D. 1923, at — o'clock — M.

E. L. Kinney, Mayor.

Orrville, Ohio, June —, 1923.

[fol. 36]

## EXHIBIT C TO REPLY

## Ordinance

Repealing an ordinance providing for electric light, Heat, and motive power in the village of Orrville, Wayne County, Ohio, said ordinance passed February 1st, 1892, and recorded in volume I, page 32, of the Ordinance Records of said village.

Be it ordained by the Council of the Village of Orrville, State of Ohio, and it is hereby ordained:

Sec. 1. That an ordinance providing for electric light, heat and motive power in the Village of Orrville, Wayne County, Ohio, passed and adopted February 1, 1892, and recorded in Volume I, Page 32, of the Ordinance Records of said Village, be and is hereby repealed.

Sec. 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed June 18, 1923.

E. L. Kinney, Mayor.

Attest: A. Jenny, Clerk.

Published in the Orrville Courier-Crescent June 22 and 29, 1923.

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[fol. 37] IN COURT OF APPEALS OF WAYNE COUNTY

MOTION FOR NEW TRIAL—Filed September 4, 1924

Now comes The Ohio Public Service Company, the party aggrieved by the decision, finding and order of the court herein and moves the court for an order vacating said decision, order and finding of the court and for a new trial for the following causes:

1st. That said order, finding and decision is not sustained by sufficient evidence.

2nd. That said order, finding and decision is contrary to law.

3rd. Error of the court in the admission of certain evidence offered by the plaintiff on the trial of said cause, against the objection of the defendant, to which action of the court the said defendant duly excepted.

4th. That said finding, decision and order of the court were in favor of the plaintiff and the same should have been in favor of the defendant.

5th. Other errors apparent upon the face of the record.  
Franklin L. Maier, C. H. Henkel, Attorneys for Defendant.

[fol. 38] IN COURT OF APPEALS OF WAYNE COUNTY

DOCKET ENTRIES—Filed September 25, 1924

Appearance Docket, Volume 2, Page 762

The original Files and Pleadings, together with an authenticated Transcript, containing all the Judgments, Docket and Journal Entries of the Court of Appeals of Wayne County, Ohio, wherein the records remain with all things concerning the same are herewith returned to the Supreme Court of the State of Ohio, in the following named cause, to-wit:

Files.

Petition and Pree., July 21, 1923.

Summons, July 21, 1923.

Returnable, July 30, 1923.

Returned and filed, July 25, 1923.

Rule Day for Answer, Aug. 18, 1923.

Answer, Aug. 18, 1923.

Motion and Brief, Sept. 11, 1923.

Reply, Jan. 28, 1924.

Motion, March 20, 1924.

Three Copies Brief, June 5, 1924.

Trans. of Testimony, June 23, 1924.

Motion for a New Trial, Sept. 4, 1924.

April 1, 1924, to-wit: Decree for Plaintiff. See entry.  
Sheriff's Return on Summons:

Received this writ July 1, 1923, at 2:30 o'clock P. M., and [fol. 39] on July 25th, 1923, I served the within named The Ohio Public Service Company, a Corporation, by Personally handing to M. L. Daviston for The Ohio Public Service Company, a Corporation, a true and certified copy thereof with all the endorsements thereon. The President, Mayor or Chairman or President of the Board of Directors or Trustees of Defendant or other chief officer of defendant nor its cashier, secretary, treasurer, clerk or managing agent being found in my county, the said M. L. Daviston being the person being in charge of the office and the usual place of business of said defendant in the Village of Orrville, Ohio.

A. W. Bucher, Sheriff.

IN COURT OF APPEALS OF WAYNE COUNTY

JOURNAL ENTRY OF ORDER GRANTING LEAVE TO FILE REPLY—  
Filed January 28th, 1924

And afterwards, to-wit, on the 28th day of January, 1924, at and during the September term of said court, 1923, an entry was made in this cause upon the Journal of said court, which is in the words and figures following, to-wit:

On application to the court leave is granted the Relator to file his reply herein instanter, and the same is filed.

Ross W. Funk, P. J.

O. K.

IN COURT OF APPEALS OF WAYNE COUNTY

JOURNAL ENTRY OF ORDER OVERRULING MOTION TO STRIKE—  
Filed April 28th, 1924, Journal 3, page 122

This day this cause came on to be heard to the court upon the motion of the defendant to strike out eleven different [fol. 40] portions of parts of the Reply of the Relator to the Answer of the Respondent; on consideration whereof the court overrules said motion in toto, to which overruling of said motion the Respondent excepts.

Critchfield & Elting, Attorneys for Plaintiff.

Approved April 28th, 1924. Franklin L. Maier, Attorney for Defendant.

IN COURT OF APPEALS OF WAYNE COUNTY

JOURNAL ENTRY OF JUDGMENT—Filed September 4th, 1924,  
Journal 3, page 130, April Term, 1924

This cause coming on to be heard upon the petition, the answer and the reply, the testimony and exhibits and arguments of counsel, upon consideration whereof, the court find that the defendant, The Ohio Public Service Company, has, as alleged, exercised franchise, and privilege of carrying on business in furnishing commercial and private lighting in the Village of Orrville, Wayne County, Ohio, contrary to and without the authority of the laws of the State of Ohio, and contrary to and without authority from said Village of Orrville,

Therefore, it is ordered and decreed that said company be and it is hereby ousted of said franchise and privilege of carrying on said business within the village limits of the Village of Orrville, as aforesaid; and that the plaintiff recover from said defendant its costs herein expended. To all of which orders, judgments and decrees the said defendant excepts.

Thereupon the defendant gave notice of a motion for [fol. 41] new trial and said motion was filed and submitted to the court and the court being fully advised in the premises, did overrule said motion, to which order, judgment and finding of the court the defendant excepts.

The court thereupon fixed the amount of the Appeal Bond at \$500.00.

Dated this 4th day of September, 1924.

A. H. Etling, L. R. Critchfield, Attorneys for Plaintiff. Franklin L. Maier and C. H. Henkle, Attorneys for Defendant.

Ross W. Funk, Presiding Judge.

(Duly certified.)

## [fol. 42] IN COURT OF APPEALS OF WAYNE COUNTY

[Title omitted]

## OPINION

Argued May 26, 1924; Decided July 10, 1924; Filed September 25, 1924

Critchfield & Etling, for Plaintiff; C. H. Henkel and Franklin L. Maier, for Defendant.

WASHBURN, J.:

In this quo warranto suit, the right of the Respondent, The Ohio Public Service Co., to use the streets of the Village of Orrville by the maintenance of electric equipment therein for the purpose of supplying electricity to the inhabitants of said Village for commercial and private lighting purposes, is challenged.

Said Respondent claims this right by virtue of a franchise granted by said Village to its predecessors in title. [fol. 43] The controlling facts necessary to a determination of the case are for the most part matters of record and not in dispute.

On Feb. 1, 1892, when the business of lighting by electricity was not developed as it is today, and when such business in such places was done by isolated and local organizations, said Village, at the request of two individuals, passed an ordinance by which it was declared and ordained by Sec. 1:

“That Aurel P. Gans and Melville D. Wilson, of Canal Dover, Ohio, their associates, successors and assigns are hereby authorized and empowered to use the streets, lanes, alleys and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power.”

By Sec. 3 it was provided that:

“In consideration of the privileges hereby granted the said Gans & Wilson, their associates, successors and assigns shall furnish the Village of Orrville on the several

streets, lanes, alleys and avenues not less than twenty-five (25) electric lamps of not less than 2,000 candle power each, to be placed wherever the Council may direct in said Village of Orrville."

See, 4 provided that:

"In consideration of the construction of said electric light plant as herein provided, the Council of said Village of Orrville hereby agrees and binds itself to take and use the light of said Gans & Wilson, their associates, successors [fol. 44] and assigns for the period of ten (10) years from and after the date upon which said light shall be first supplied and to pay same quarter annually for said lighting, a price equal to seventy-two (\$72) dollars per year for each and every lamp of 2,000 candle power, said lamps to be lighted and extinguished and kept in repair by and at the expense of said Gans & Wilson, their associates, successors and assigns; the total number of lamps thus supplied to be not less than twenty-five 2,000 candle power lamps—are light."

Said ordinance also contained a provision that "The privilege hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of said Gans & Wilson to perform any of the conditions hereby imposed, etc.," and that said Gans & Wilson agreed to notify the Council in writing of their acceptance of said ordinance within ten days from the passage thereof, "which acceptance, together with the ordinance, shall constitute a contract."

The ordinance contained no express provision as to the right to use the streets of the Village to furnish electricity for commercial and private lighting purposes, but the parties construed said ordinance as granting such right, and a plant was constructed under such ordinance and electricity for both public and private lighting was furnished.

While at this late day no written notice of acceptance, as provided in the ordinance, could be produced, the conduct of the parties establishes an acceptance which made the contract binding upon both parties.

[fol. 45] In 1893 a corporation known as the Orrville Light, Heat & Power Co. was formed, which corporation succeeded to the rights and assumed the obligations of

Gans and Wilson under said contract, and furnished electricity for both public and private lighting.

In 1902, at the expiration of said 10-year period, when said The Orrville Light, Heat & Power Co. was using the streets of said Village by virtue of said ordinance of 1892, and when the Village had the power to grant a franchise conferring the right to make such use of its streets and to fix the price to be charged the citizens of the Village for commercial lighting by the party so using its streets, said Village, without referring in any way to said ordinance of 1892 or the rights and obligations thereunder, passed an ordinance by which said company contracted to light the streets of said Village for a period of five years, and the Village agreed to pay a stipulated price for said lighting, and said Village exercised its right to and did fix in said ordinance of 1902 the price at which said company should "furnish light for full commercial lighting purposes in said Village to the citizens thereof." Said contract was executed by the parties, and at its expiration in 1907 the Village passed an ordinance by which it contracted with said company for the lighting of the streets of the Village for another period of five years, and fixed the price at which said company should furnish light for commercial purposes to the citizens of said Village.

Soon thereafter said company sold all of its assets to D. I. Rennecker and divided the proceeds accruing therefrom [fol. 46] among its stockholders, and thereafter ceased to function as a corporation.

In 1910 and before the expiration of said last-named 5 year period, said Village, without referring therein to the ordinance of 1892 or any of said subsequent ordinances, passed an ordinance by which it contracted with said D. I. Rennecker for the lighting of its streets for another period of five years, to begin at the expiration of the last-named contract period, and in said ordinance said Village also fixed the price at which Rennecker should furnish light for commercial lighting to the citizens of said Village.

Said Rennecker continued to operate said business for his sole account, but under the name of said defunct corporation, until 1913, when, with the approval of the Public Utilities Commission of Ohio, he sold out to The Massillon Electric & Gas Co.

Thereafter said Village determined to construct a municipal plant, and there ensued much litigation designed to prevent the construction of said municipal plant, but the same was finally constructed and put in full operation at about the time of the expiration of the 5-year period provided for in said last-named ordinance of 1910, to-wit: July 15, 1917.

After the construction and operation of said municipal plant, while The Massillon Electric & Gas Co. did not furnish electricity for the public lighting of said Village, it continued to furnish a few of the citizens of said Village with electricity for commercial lighting purposes, and in 1921 the Respondent, The Ohio Public Service Co., being [fol. 47] charged with knowledge of the situation and the public acts of said Village, purchased, with the approval of the Public Utilities Commission of Ohio, the assets and rights of The Massillon Electric & Gas Co., and since then has continued to furnish and is now furnishing electricity to some of the citizens of said Village for commercial lighting purposes, and claims the right to do so by virtue of the ordinance of 1892 and the acts of said Village subsequent thereto.

Some claim seems to be made that the Respondent has in some manner obtained from the State of Ohio the right to use the streets of the Village of Orrville without its consent and independent of any action taken by it.

Gans and Wilson received no right from the state that they could transfer to another: their right, whatever it was, which they could transfer to another, came from the Village alone, and existed by virtue of their contract with the Village.

However, this is not very important, for the Orrville Light, Heat & Power Co. was organized in 1893.

If, when the Orrville Light, Heat & Power Co. was organized, it obtained from the state by virtue of Sec. 3454 (G. C. 9170) and 3471-a (G. C. 9192 and 9193) of the Revised Statutes as they existed when said company was organized, the right to use the streets of Orrville for the purpose of furnishing electricity for commercial purposes independent of any action by the Village, such right obtained from the state as distinguished from any right obtained from the Village, was not after 1896 assignable without the consent of the state.

[fol. 48] Before said company attempted any such assignment, said Sec. 3174-a was amended so as to prohibit electric companies from exercising in a municipality without the consent of the latter, the rights granted it under said Sec. 3454; that prohibition must be construed as a limitation upon the right of assignment of such a right theretofore granted, and as requiring the consent of the state to any transfer of such a right theretofore obtained from the state.

The language of the amendment of R. S. 3471-a (92 O. L. 205) is significant. Theretofore the grant to telegraph companies to use the highways of the state provided as to streets in a city or village that the mode of such use should be agreed upon by the municipality and the telegraph company, and that if they could not agree, the probate court should settle the matter. These statutes did not apply to companies furnishing electricity; as to such companies, the law (83 O. L. 143) authorized the use of streets in municipalities, "with the consent of the municipal authorities."

Later, in 1887 (84 O. L. 7—R. S. 3471-a), the laws as to telegraph companies were made to apply to companies furnishing electricity, "so far as the same may be applicable," but the law requiring consent of a municipality to the use of the streets by electric companies (83 O. L. 143), was not expressly repealed (and to the writer of this opinion, notwithstanding the decision in 93 O. S. 428, it seems perfectly plain that it was not repealed by implication, the clause "so far as the same may be applicable" indicating an intention not to repeal the law requiring consent of a municipality to the use of its streets by electric companies).

In 1896, R. S. 3471-a was amended so as to specifically require what had theretofore been required by 83 O. L. 143 (at that time still in force and known as Sec. 8752, Giaugue's Statutes of 1896, and later as Sec. 3471-3 of Bates' Statutes of 1902, and now in force and unchanged and known as G. C. Sec. 9195), to-wit: consent of a municipality to the use of its streets by companies furnishing electricity, and the language of that amendment is significant, as has been said.

That amendment contains a provision that "provided, however, that in order to subject the same (companies furnishing electricity) to municipal control alone, no person or company shall place, string, construct or maintain any line, wire, fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality.

\* \* \* This inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court." (G. C. Sec. 9193.)

This inhibition was against "maintaining any line, etc.", that is, continuing to use the streets of a municipality without its consent, except only where the probate court had acted under the law, thus plainly indicating that the legislature regarded the act of 1886 (83 O. L. 143) as having been in force and as prohibiting such use without such consent, and just as plainly negatives the idea that the legislature had ever granted to electric companies the right to use the streets of a municipality without the consent of such municipality.

[fol. 50] But however this may be, this act would appear to be the exercise on the part of the legislature of its right under Sec. 2 of Article I of the Bill of Rights of the Constitution of Ohio to revoke or repeal any right which it might be said to have granted electric companies to use the streets of a municipality without its consent, and to prohibit the exercise of such right save only in cases where the probate court had by decree supplied such consent.

It would seem, then, that any right which The Orrville Light, Heat & Power Co. acquired from the state, as distinguished from a right granted by the Village of Orrville, was not transferred by said company to D. I. Rennecker and by him through the successive companies transferred to Respondent, and that in view of the law and the said acts of the legislature, no such right could have been transferred without the consent of the state.

We are not now speaking of a franchise right created by contract, but of a right or privilege granted by the state for the benefit of the public; a right granted not to any specific corporation but to all similar corporations, the grant being general and conferred by a general law.

A quasi public corporation, in respect to the right granted to it by the state to use public property, for the benefit, in part at least, of the public, owes a duty to the public to perform such public trust, and such right, in the absence of [fol. 51] express statutory authority, is non-transferable.

In the instant case there is not only no statutory authority authorizing such transfer, but there is a statutory enactment by which the state established a public policy to no longer confer such a right upon corporations thereafter organized, and the state in this action is questioning the validity of such claimed transfer.

"It is now settled by an overwhelming weight of authority that public or quasi public corporations, which owe duties to the public as well as to their stockholders, have no right to transfer their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. It is the duty of gas companies, water companies, electric companies, telegraph and telephone companies, and all similar corporations, which have obtained the right to use the public streets for the erection or extension of their works, to serve the public faithfully and impartially, and at reasonable rates. This is a duty the performance of which may be enforced by the courts. And unless authority has been granted by the legislature an attempted transfer of its franchise by such a corporation is wrongful. Such franchises are, in the absence of express statutory authority, deemed to be non-transferable, for the reason that they constitute public trusts, carrying with them the duty of the performance of such trusts, and hence that liability for the performance of duty cannot be cast exclusively upon another, unless with the consent of the sovereign. It is not to be understood, [fol. 52] however, that an attempted transfer is *ipso facto* void; on the contrary, the transfer will be treated, ordinarily, as valid and effectual until attacked by the sovereign grantor in a direct proceeding instituted for the purpose."

12 R. C. L., Sec. 43, pages 217 and 218.

As has been said, this is a proceeding instituted by the state for the purpose of attacking said claimed transfer.

It is to be observed that Secs. 3454 (G. C. 9170) and 3461 (G. C. 9178 and 9179) of the Revised Statutes (even if made

applicable to electric companies by revised Statute 3471-a), as those statutes were in 1893, when the Orrville Light, Heat & Power Co. was organized, does not confer an absolute right to use the streets of a village, but that the right granted by the state as to village streets, giving them the right to acquire the right to use same, is similar in character to the right of eminent domain—at least that “it partakes of the character of an exercise of the right of eminent domain.”

Zanesville vs. Telephone Co., 64 O. S. 67.

Telephone Co. vs. Cincinnati, 73 O. S., at p. 77.

A corporation's right to eminent domain is a right existing by virtue of and depending upon its being a corporation, and such right is not transferable by such corporation to an individual. See Note, 35 A. S. R. 403.

When the subsequent corporations were organized, they derived from the state no such right to use the streets of the Village of Orrville, independent of any action taken by said Village, because the law then gave such corporations no [fol. 53] right to make use of a Village street but left it optional with the Village to confer or withhold such right, and hence it seems clear to us that the right of the Respondent to use the streets of Orrville must come from and be traceable to some act of said Village.

In other words, whatever right the state granted independent of any action on the part of the Village of Orrville, was revoked by the state in the exercise of its power to do so, given it by the Bill of Rights of the Constitution, leaving the right to use the streets of Orrville to depend upon the acts of the Village.

Under the evidence in this case we do not find, as Relator asks us to find, that the Respondent did not acquire such rights as were granted by the ordinance of 1892, nor do we find that such rights have been forfeited by the conduct of Respondent and its predecessors in title.

And likewise, notwithstanding the established rule that such a grant is to be construed “strictly against the grantee and liberally in favor of the public” (52 O. S. 262), we do not find that no right to use the streets of said Village for the purpose of furnishing electricity for commercial purposes was granted by the ordinance of 1892.

In view of the fact that the parties construed said ordinance as granting such right, and that said Village for so many years recognized the existence and transfer of such right and regulated the exercise thereof, we assume, with [fol. 54] out deciding, that such right was granted by said ordinance.

In 1923 said Village repealed said ordinance of 1892, and formally notified Respondent "that all rights, privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including said The Ohio Public Service Co., be and the same are hereby terminated and ended", and ordered Respondent to remove its poles, wires, etc., from the streets of said Village within thirty days.

The Relator claims that even if the Village had power to and did, by the ordinance of 1892, or by subsequent ordinances, grant a right to use its streets for the purpose of furnishing electricity for commercial purposes, and even if the Respondent succeeded to and acquired such right from those whom it was granted, still, the period of time during which such right should continue not being fixed, the Village had power to terminate such right by the action taken in 1923.

With this contention of the Relator we concur.

On this question a comparatively recent case decided by the Supreme Court of the U. S. is relied upon by the Respondent; that case, N. O. T. & L. Co. vs. Ohio, reversed the decision of the Supreme Court of Ohio, reported in 93 O. S. 466.

The law as stated by the Supreme Court of the U. S. is that a franchise granted by the proper state authority without limit as to duration, "in the absence of circumstances showing an intention to give or receive a mere re- [fol. 55] vocable right, is a contract not subject to annulment at the will of the granting authority".

In the case at bar, two individuals, for themselves and their assigns, contracted with the village to construct a plant and light by electricity the streets of the village for a period of ten years, the village agreeing to pay them a stipulated price per light; the sections of the ordinance from 3 to 8, both inclusive, clearly have reference to that one subject and nothing else; in order to comply with the

agreement to light such streets for ten years, it was, of course, necessary for the men who proposed to do that to use the streets for the purpose of the distribution of electricity, and Section 1 of the ordinance "authorized and empowered" them to make such use of the street, and Section 2 provided that in doing so they should not unnecessarily obstruct the streets or unnecessarily mutilate, trim or cut the trees, but that they should not be liable in damages for necessary trimming and cutting, and that the wires should be placed on poles 30 feet long and placed in the ground a sufficient depth to insure perfect safety.

Nowhere in the ordinance is there anything mentioned about commercial lighting or the price to be charged therefor. Even if that right is implied, do not the circumstances show that such right was incident to the public lighting, which was the real subject of the contract, or at least that the parties intended that at the expiration of the 10-year period such right should be at the will of the parties and revocable?

But irrespective of this suggestion, the Supreme Court [fol. 56] of Ohio, in a very recent case, expressly refused to follow the United States case and reiterated its former holding of the law to be:

"When a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance, which are accepted in writing by said company, such action by both parties constitutes a contract and the rights of the parties thereunder are to be determined by the contract itself. \* \* \*

"Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto. The incorporated company may therefore voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom; \* \* \*

"When a pronouncement of a principle of law governing the construction of a provision of a contract entered into in

this state between parties residing in this state to be performed in this state is announced by this court, such pronouncement settles the law as to such provision, not only from the date of such pronouncement, but from the date when the rights of the parties to such contract attached, until such pronouncement is overruled by this court, or reversed by the Supreme Court of the United States.

"The fact that the Supreme Court of the United States [fol. 57] reaches a different conclusion in construing a similar provision in a particular case under dissimilar circumstances is not effective to overrule such pronouncement."

East Ohio Gas Co. vs. Cleveland, 106 O. S. 489.

This case clearly establishes the law to be that when a municipality has the right to give or withhold its consent to the use of its streets by a public utility, the giving of such consent by the municipality confers the right to use the streets and constitutes the contract by which the rights of the parties are to be determined; in other words, the franchise is given by the municipality and not by the state direct, and is to be construed as a contract between the utility and the municipality.

The Supreme Court of Ohio having determined the construction which should be placed upon a contract such as is involved in the case at bar, to be that where the contract is silent as to duration it is terminable at the will of either party thereto, and having adhered to such rule notwithstanding such decision of the Supreme Court of the United States, we follow the Supreme Court of Ohio and hold in this case that whatever right was granted by said Village to use the streets of said Village for the purpose of furnishing electricity for commercial purposes, was properly revoked and terminated by said Village, by the action taken by the Village in 1923, and that therefore the Respondent has no right to use the streets of said Village for said purpose.

A judgment of ouster may be entered.

Funk, P. J., and Pardee, J., concur in judgment.

[fol. 58] IN COURT OF APPEALS OF WAYNE COUNTY

**Statement of Evidence****AGREED STATEMENT OF FACTS**

It is agreed by and between the parties that the Respondent, The Ohio Public Service Company, is a corporation organized October 11, 1921, for the purpose of building, owning, acquiring, leasing, operating, and maintaining power plants, equipment, appliances and appurtenances thereto, together with the erection, construction, maintenance and operation of the necessary pole lines, posts, piers, abutments, wires, cables, conduits, and incident thereto to drill for gas, produce gas incident to its business, to lay pipes, conduits, manholes, and other appliances and fixtures, necessary and proper for the generating, manufacture, producing, procuring, selling, furnishing, supplying, conducting, carrying, transporting and distributing to public and private buildings, avenues, lanes and squares, public places, steam and hot water, electric power, light and energy and natural and artificial gas for light, heat, power and other purposes in the several municipalities, counties and political and governmental subdivisions thereof in the State of Ohio, and incident to such purpose to acquire and use street railway or railways and also to acquire all franchises necessary to the full exercise of said power.

That it filed an application with the Public Utilities Commission of Ohio, which was known as proceeding 2397 before said Commission, for authority to purchase certain property and that the Public Utilities Commission on October 12, 1921, made an order and a subsequent order on June 5, 1922; that a certified copy of such petition, order and supplemental order is herewith submitted marked Exhibit A.

That subsequent thereto and on or about the 29th day of October, 1921, The Ohio Public Service Company had delivered to it a deed by The Massillon Electric & Gas Co., which deed was recorded in Volume 190, page 334, a copy of which deed is submitted in evidence and marked Exhibit B, and that the Respondent, The Ohio Public Service Company, after it acquired such property, made, executed

and delivered a mortgage thereon to The Bankers Trust Company of New York, which was dated as of October 1, 1921, and which was recorded in the mortgage records of Wayne County, Ohio, Volume 166, page 56, and following, and subsequently, made, executed and delivered a supplemental mortgage which is recorded in the mortgage records of Wayne County, Ohio, Volume 166, page 153, copies of which are hereto attached, marked Exhibits C and D, and that on October 29, 1921, The Massillon Electric & Gas Company formally assigned all its right, title and interest in and to the franchise granted Ansel P. Gans and Melville D. Wilson, their associates and assigns, February 1, 1892, which assignment is submitted herewith and is marked Exhibit E.

That The Massillon Electric & Gas Company was a corporation organized under the laws of Ohio. That the Massillon Electric & Gas Company and the Orrville Light, Heat & Power Company filed a joint application with the [fol. 60] Public Service Commission, now the Public Utilities Commission of Ohio, being proceeding No. 362, a copy of which joint application is herewith filed and marked Exhibit F.

That when the Public Utilities Commission made an order heretofore marked Exhibit F, it had before it the application, copy of which is herewith filed, a copy of an ordinance of the Village of Orrville, Ohio, dated March 12, 1910, a copy of an ordinance of the Village of Orrville, Ohio, dated Feby. 1, 1892, which are filed herewith and marked Exhibit G.

That thereafter, and on the 11th day of March, 1913, D. I. Renneckar, on behalf of The Orrville Light, Heat & Power Co., made a deed of transfer to The Massillon Electric & Gas Co., which was recorded in the Deed Records of Wayne County, Ohio, Volume 168, page 15, and following, a copy of which is herewith submitted and marked Exhibit H.

That prior thereto the Orrville Light, Heat & Power Co. made, executed and delivered a deed to D. I. Renneckar dated July 1, 1907, which was recorded in the Deed Records of Wayne County, Ohio, Volume 156, page 213 and following, a copy of which deed is herewith submitted and marked Exhibit I.

The Orrville Light, Heat & Power Company was a corporation organized under the laws of Ohio, on January 3, 1893, a certified copy of the articles of incorporation are herewith filed and marked Exhibit J.

That a copy of an ordinance entitled "An ordinance repealing the ordinance of Feb. 1, 1892," which is recorded [fol. 61] in Vol. 1, page 32, of the Ordinance Records of said Village, is submitted in evidence. Said ordinance repealing said ordinance of 1892 was passed June 18, 1923, and that a copy of said ordinance was served on the Respondent herein on the 19th day of June, 1923.

That a copy of a resolution, being notice to The Ohio Public Service Co. of the termination of the franchise granted Feb. 1, 1892, and notice to remove all poles, lines, equipment, etc., was served on the said Respondent on June 19, 1923, said resolution having been passed on June 18, 1923. That both said ordinances and said resolution were published in The Orrville Courier-Crescent, according to law. Printed copies of such ordinance and resolution are upon a pastboard, which has been marked Exhibit K. The said ordinance and resolution were duly submitted and regularly passed by the Council.

It is admitted that all ordinances and resolutions passed or adopted by the Council of the Village of Orrville were regularly introduced, considered and adopted, and where necessary were published, and that no objection is made that they were not adopted according to the forms of the law in a regular legal and valid manner, but respondent reserves the question as to the legal force and effect thereof, and also the question of the competency of some of the enactment.

That upon receipt of notice of said resolution and repeal of said ordinance, that the Respondent thereupon addressed a communication to the Village of Orrville, Ohio, and the Council of said Village, which is submitted herewith as evidence and marked Exhibit L. Which communication was received on or about July 19, 1923, and was dated July 16, 1923.

That the Massillon Electric & Gas Co. brought an action against the Village of Orrville and others in the Common Pleas Court of Wayne County, Ohio, being cause No. 24440,

as shown on the appearance docket No. 53 of said court, petition having been filed March 12, 1914, and final record of said cause appearing in Volume 125, page 187, of the records of the Common Pleas Court of Wayne County, Ohio.

That said cause was appealed to the Circuit Court of Wayne County, Ohio, and known as Cause No. 637 and appears in Record Volume 6, page 287, of said court. A certified copy of which Exhibit is marked Exhibit 2 and attached herewith.

That the Massillon Electric & Gas Co. also commenced an action against the Village of Orrville and others, in the Common Pleas Court of Wayne County, Ohio, which cause was No. 24458. That petition was filed April 3, 1914, as appears in the Appearance Docket 53 in the Clerk's office of the Common Pleas Court of said county. That the final record of said cause is shown in Volume 125, page 205 and following, of the final records in said office.

Said cause was appealed to the Circuit Court of Wayne County, Ohio, and was there known as cause No. 638; final record of said cause in said court is shown in Volume 6, page 291. A certified copy of which is marked Exhibit R and submitted.

[fol. 63] That there was a certain action brought in the Common Pleas Court of Wayne County, Ohio, by the Dravo-Doyle Company versus the Village of Orrville, which cause was ultimately carried to the Supreme Court of Ohio, and the record of which cause it filed herewith and marked Exhibit M.

It is further agreed by and between the parties that in case any further record should be discovered that is not now known of and admitted, that either party shall have the right to introduce such record.

That Ansel P. Gans and Mellville D. Wilson, after Feby. 1, 1892, operated under and exercised the rights granted in the ordinance passed by the Council of the Village of Orrville on said date.

That the Supreme Court of Ohio in the case of Dravo-Doyle Co. vs. The Village of Orrville, reported in the 93 O. S. 236 on page 239, stated that on July 21, 1913, and prior thereto, The Massillon Electric & Gas Co., an Ohio corporation, owned an electric lighting plant in the Village and was

furnishing electricity to said Village and the inhabitants thereof, for both public and private lighting, under a franchise granted by said Village in 1892, and the said franchise has not yet expired.

And on page 244 said, "The franchise was granted in 1892 and fixed the contractual rights and duties of the parties."

Relator claims that the question of duration of said franchise and the interest that The Massillon Electric & Gas Co. had under said franchise of 1892 was not in issue in the case of Dravo-Doyle Co. vs. The Village of Orrville, and [fol. 64] the statements of the court were mere obiter dicta and should not bind this court when said questions are in issue, or at least the question of the duration of said franchise, its construction and interpretation, and the said Village of Orrville is not a party in the proceedings at bar.

The Relator does not admit that the ordinance of Feby. 1, 1892, was duly and legally passed or published according to law.

The paper marked Exhibit X is admitted by the Respondent to be a list of the private consumers in Orrville and the vicinity of Orrville outside of the municipality. That there are 58 all together inside and outside the municipality. That 32 of them are outside the municipality leaving 26 inside the municipality, one of which is The Ohio Public Service Co. itself. That the numbers beginning with 5245 inclusive and 5276 are outside of the Village of Orrville; also 8303 are outside, the others being inside the Village of Orrville on this exhibit, and that some of said 26 in the Village have double service by arrangement of switches.

(In the Examination of Alfred Jenny, Clerk of the Village of Orrville)

The Respondent admits, subject to the question of competency and materiality, that a record of outages was kept with the clerk; that the clerk has with him that record, and that the record shows the fact to be that there was a record of outages kept as shown on what is now marked Exhibit Z. [fol. 65] The witness has a memorandum prepared by himself showing each year's outages beginning with 1913 and ending 1917 in June, when the contract with Renneckar,

which he says he assigned to The Massillon Company, expired, is offered in evidence.

It is admitted by counsel representing the respective parties that the Village of Orrville constructed a plant for municipal and private lighting between the years 1914 and 1916, and some time thereafter, date uncertain, current was turned on for trial purposes only, and service for public lighting and private consumers was thereafter, viz.: on or about July 15, 1917, furnished by the Village; and the Village made payment to The Massillon Electric & Gas Co. to some date in July, 1917. It is also admitted that a proceeding in quo warranto was commenced in the Court of Appeals of Wayne County, Ohio, on relation of Joseph O. Fritz, Prosecuting Attorney, vs. The Ohio Public Service Company, on April 2, 1923, which was Cause 757, which was dismissed on motion of Relator, without prejudice, prior to the commencement of this cause 762.

It is also admitted that A. H. Postlewait and others made, executed and delivered a deed to The Orrville Light, Heat & Power Company for certain property in the Village of Orrville, Ohio, on July 12, 1902, which deed is recorded in the Deed Records of Wayne County, Ohio, Volume 145, page 451, a certified copy of which deed is herewith submitted, marked Exhibit N.

[fo<sup>l</sup>. 66] Also that Postlewait and others made, executed and delivered a deed to D. I. Rennekar, dated September 29, 1911, and recorded in the Deed Records of Wayne County, Ohio, Vol. 164, page 450, a certified copy of which deed is submitted herewith in evidence marked Exhibit O.

That D. I. Rennekar made, executed and delivered a mortgage to J. A. Wagner and H. W. Enck, on certain property on July 1, 1907, which mortgage is recorded in the Mortgage Records of Wayne County, Ohio, Volume 141, page 117, a certified copy of said mortgage is submitted in evidence and marked Exhibit P.

It is agreed that at the time of the filing of the petition herein The Ohio Public Service Company had certain property in the Village of Orrville, Ohio.

By Relator: We admit that there were certain wires, poles, electrical equipment in the Village of Orrville, claimed by Respondent to belong to Respondent in the Village of Orrville, but Relator does not admit any title by a

chain of descent of franchise rights and privileges from Gans and Wilson.

By Henkel: There was also an agreement that what was referred to as transcript of electric lighting ordinances of the Village of Orrville, Ohio, which counsel originally agreed was a true and accurate transcript thereof, and concerning which Judge Critchfield later withdrew his agreement as to the ordinance of February 1, 1892, counsel for Respondent now having offered the original records, [fol. 67] withdraws the agreement as to this exhibit for reasons heretofore stated, chiefly that it was not a complete transcript, and also because the transcript had certain notes therein which was not a matter of record but the individual opinion of the one preparing the transcript.

It is understood that counsel will cause to be prepared copies of the records to be certified to by the clerk and that the same will be submitted in evidence in place of the original records. It being understood further that in reference to the records of the proceedings of the council only such portion of the minutes will be prepared as refer directly to the subject matter in issue.

Critchfield, addressing Henkel: I do not know just where we are at in regard to the introduction of the resolution passed on June 18, 1923, being a notice to the Respondent of the termination of any ordinance under which they claim to light the streets of Orrville?

Answer by Henkel: I believe that the agreed statement of facts shows that this resolution was submitted, considered and properly passed; that the same was approved and notice thereof was served upon the Respondent on June 19, 1923.

Question by Critchfield: As to the repeal of the ordinance of Feb. 1, 1892, what do you agree as to that?

[fol 68] Answer by Henkel: If the agreement of facts does not already show such agreement, it is now agreed that an ordinance entitled "An ordinance repealing an ordinance," etc., passed Feb. 1, 1892, and recorded in Volume 1, page 32 and so forth, was properly submitted, considered and adopted by the Council of the Village of Orrville, Ohio, and published, and that a copy thereof was served upon the officers of the Respondent, and that a copy of said resolution and said ordinance were served upon the Respondent and are in evidence marked Exhibit K.

Critchfield: There has been introduced in evidence by the Respondent cases in which The Massillon Electric & Gas Co. and the Dravo-Doyle Co. and the Village of Orrville were parties; we object to the competency and relevancy of said cases, because the State of Ohio was not a party to those cases in any manner and therefore not bound by any judgment, decision or decree in those cases.

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### COURT OF APPEALS

#### Transcript

Be it remembered that at the trial of this cause, which came on to be heard on the 26th day of May, 1924, being a date in the April Term, 1924, of the Court of Appeals of Wayne County, Ohio, before the Hon. Ross W. Funk, Hon. [fol. 69] G. C. Washburn, and Hon. Wm. S. Pardee, Hon. Ross W. Funk presiding, the Respondent, to maintain the issues on its part to be maintained, offered the following testimony:

Thereupon the respondent called the witness CHARLES B. GILBERT, who, being first duly sworn, testified as follows:

#### Direct examination.

By C. H. Henkel:

Q. State your name?

A. Charles B. Gilbert.

Q. Where do you live?

A. Cleveland, Ohio.

Q. How long have you lived there?

A. Since 1902.

Q. You may state whether or not at one time you were interested in the lighting business in the Village of Orrville, this county?

A. Yes, sir.

Q. When?

A. From late in 1892 until 1902.

Q. Can you state to the court when the lighting plant was constructed in Orrville?

A. To the best of my recollection the direct current to furnish street lighting was given a tryout about the 20th of May, 1892, and they burned an armature.

Q. By whom was that plant constructed?

A. David King and J. A. Wagner.

Q. Did you know Gans and Wilson?

A. Yes, sir.

Q. You may state whether or not King and Wagner were associated with Gans and Wilson?

A. They were.

Q. How long were you connected with that plant?  
[fol. 70] A. I went to Orrville as an employe in October or November, 1892.

Q. You continued in that capacity how long?

A. Two years.

Q. Do you remember of the Orrville Light, Heat & Power Co.?

A. Yes, sir.

Q. State whether or not you became a stockholder or interested in that company?

A. I think in 1894 or 1895 I purchased David King's half interest in the Orrville Light, Heat & Power Company, which consisted of fifty shares of par value stock.

Q. Who else was interested in that project?

A. They were under the control of J. A. Wagner, Canal Dover.

Q. State whether or not Gans and Wilson were not also residents of Canal Dover, Ohio?

A. They were for a time.

Q. How long did you continue in control or operation of that project?

A. From the time of the project until 1892; until the Village of Orrville granted a new lighting contract.

—. From 1892 to 1902 state whether or not that plant was continually operated?

A. Yes, sir.

Q. By whom?

A. I was in absolute charge myself.

Q. If you know, you may state whether or not it was operated under a franchise of February 1, 1892?

Objected to; sustained; exceptions.

Q. If you know, you may state under what arrangement, if any, the plant was operated from 1892 until 1902, when you left?

A. I knew nothing about the operation until the time [fol. 71] I purchased the 50 shares of stock from David King. At that time I found out that they did have a franchise.

Q. Was there a writing between you and King?

A. Yes, sir.

Objected to.

Q. Have you that agreement?

A. No, sir.

Q. Have you any copy?

A. No, sir, no records whatever.

Q. As search would not help you?

A. No, sir.

Q. You bought half the stock?

A. Yes, sir.

Q. Did you make an investigation?

A. Yes, sir.

Q. What did you ascertain the fact to be as to operation in the Village at that time?

A. I ascertained to my own satisfaction.

Q. What did you find out?

A. Before I finally closed the deal, I satisfied myself that we had a valid franchise under which we were operating.

Counsel for Relator asks that the answer be stricken out; overruled; exceptions.

Q. While you were there you may state whether or not The Orrville Light, Heat & Power Co. entered into any agreement at any time with the Village of Orrville for public lighting?

A. They did.

Q. You may state whether or not you ever had any negotiations with the Council of the Village of Orrville?

A. A great many.

Q. Will you briefly detail just what negotiations you had with the Village?

Objected to; overruled; exceptions.

[fol. 72] A. About, I should say, about 1896 or thereabouts there developed quite a sentiment in favor of municipal ownership in Orrville, and the plant of the Orrville Light, Heat & Power Co. was situated at the intersection of the three railroads; in the meantime, the Village of Orrville had built the waterworks plant, which was about a mile and a quarter north of town, not on the railroad. Naturally, I made every effort to prevent the building of the new plant, without first having purchased the one we had purchased and established. Of course, in this controversy as of whether this municipal ownership should be had or not, I appeared before the Council at the special election to issue \$15,000.00 worth of bonds, and I was given the privilege of the floor at different times.

Q. At any time was the question of the franchise in existence?

Objected to.

A. The first election the Village lost and my attorneys, Weygandt and Horn, came to the Common Pleas Court and secured a temporary injunction, and in the meantime we secured an amendment to the state law which prohibited any village in the State of Ohio from making a gas plant in the State of Ohio without first purchasing those in existence. I appeared on the floor of the Council the night that they prepared to sell the bonds after the second election had been carried by the city. At that meeting I stated to Judge Orr, who was city solicitor, that it would be well to examine a new law that prevented the city from building an electric light plant.

[fol. 73] Q. I direct your attention to the previous question whether or not at any time when you appeared on the Council floor there was or not discussed this grant of February 1, 1892?

A. It was discussed.

Q. Will you relate to the court as near as you can what took place?

A. I made the statement that I contended that the franchise was indefinite and therefore perpetual.

Q. What, if anything, did any member of the Council say?

A. It never was contradicted.

Cross-examination.

By L. R. Critchfield:

Q. You are an attorney?

A. No, sir.

Q. Where did you get the idea that that ordinance of 1892 was perpetual?

A. From Tom L. Johnson, who was my particular friend.

Q. He did not know what some of the courts have been holding about some of those franchises?

A. Possibly not.

Q. It came up in 1896?

A. I think so, about that time. After that they arranged the lighting contract with various people.

Q. From 1897 to 1902; 1907 to 1912?

A. Yes, sir.

Redirect examination.

By C. H. Henkel:

Q. To whom did you sell?

A. Mr. Wagner made the negotiations; I think it was Mr. Enek.

[fol. 74] Q. When you made that sale, how was it made?

A. Transfer of stock certificate.

Re-redirect examination.

By L. R. Critchfield:

Q. There was no writing or written agreement between you and Wagner when you sold out, outside of the transfer on the books of your fifty shares?

A. I don't think so.

Q. When was that?

A. 1902.

Q. Was that before or after the contract ordinance was granted to the Orrville Light, Heat & Power Company?

A. After. We had an agreement, Mr. Wagner and I, that neither party would sell without the other's consent.

Q. This talk that you had with the Council, there was no councilmanic action taken or passing any ordinance or resolution by the Council, was there?

A. This was at the time these bond issues were pending.

Q. No action was taken by the Council in any way as to a franchise for electric lighting for the Village?

A. None, only to provide bonds to build a new municipal plant.

[fol. 75] And, further, the respondent to maintain the issues on its part, called the witness **GEORGE W. KING**, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. State your name?

A. George W. King.

Q. Where do you live?

A. Dover.

Q. How long have you lived there?

A. Sixty years.

Q. Did you know Ansel P. Gans?

A. Yes, sir.

Q. Did you know Melville D. Wilson?

A. Yes, sir.

Q. Tell the court what your father's name was?

A. David King.

Q. State whether or not your father was associated with Ansel P. Gans and Melville D. Wilson in the construction of a plant at Orrville?

A. Yes, sir.

Q. When did he become so associated, if you know?

A. They got a franchise and then they came back to him. As I understand it, he furnished the money to build the plant.

Counsel for Relator asks that the answer be stricken out; sustained; exceptions.

Q. You may state from your own knowledge whether or not your father, David King, became associated with Gans and Wilson in the construction of a light plant at Orrville, Ohio?

A. Yes, sir.

[fol. 76] Q. When?

A. About the time they took the franchise.

Q. After that time, state whether or not your father continued to be interested in that property?

A. Yes, sir.

Q. If you know the fact to be, you may so state, whether your father, yourself and three Wagners organized, Jan. 3, 1893, The Orrville Light, Heat & Power Co.?

A. Yes, sir.

Q. How long, if you know, did you and your father continue to have an interest in this Orrville property?

A. He had an interest in it until Mr. Gilbert bought my father out.

Q. You said a moment ago you did not remember just what date it was?

A. No, sir.

Q. If you recall, you may state whether or not you and your father transferred this stock in your company to Mr. Gilbert, who just testified?

A. Yes, sir.

Objected to.

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[fol. 77] And, further, the respondent, to maintain the issues on its part, called the witness HENRY W. ENCK, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel.

Q. You may state your name?

A. Henry W. Enck.

Q. Where do you reside?

A. Dover, Ohio.

Q. How long have you resided there?

A. About 75 years.

Q. Did you know Mr. David King?

A. Yes, sir.

Q. You may state whether or not at any time you became interested in The Orrville Light, Heat & Power Company, and if so, when?

A. About 1902 I bought a half interest.

Q. From whom did you acquire that interest?

A. The conversation was between Wagner and I, but when the deal was made it appeared to be Gilbert's half interest.

Q. Who at that time, when you purchased an interest in this company in 1902, who owned the other half?

A. John Wagner.

Q. If you know, were any records kept of the proceedings of The Arrville Light, Heat & Power Co.?

A. I don't know anything about it.

Q. How long did you continue to be interested in this company?

A. I think about four years.

[fol. 78] Q. During that time you may state whether or not the light plant was operated in Orrville?

A. Yes, sir.

Q. Was any other company operated there during that period of time?

A. No, sir.

Q. Do you know to whom you sold?

A. To Renneckar.

Cross-examination.

By L. R. Critchfield:

Q. The whole corporation sold to Renneckar?

A. Yes, sir.

Q. He was an individual?

A. Yes, sir.

Q. How was that done, by a proceeding according to law to sell out the whole assets of the company?

A. I suppose so, because we sold him everything we had.

Q. You got paid?

A. Yes, sir.

Q. Do you know how it was done?

A. They paid the money and they kept on running.

Q. You do not know whether the law was complied with or not, do you?

A. I know we sold all I had.

Q. Was that sale made in writing?

A. It was all verbally. It was paid in money before he left. It was at my office at Dover.

Q. Mr. Renneckar paid in money?

A. I was talking about when I bought. He did not pay it all in cash.

Q. How did he pay it?

A. He paid in installments.

Q. Did you people have any writings at that time?

A. I did not. Mr. Wagner attended to that part.

Q. Is he here?

A. He is dead long ago.

Q. You say you had no writings for the part you took in it?

A. I got certificates.

[fol. 79] Q. In the bank?

A. Stock certificates.

Q. What kind?

A. Stock certificates.

Q. In what?

A. In this company.

Q. You still owned stock in the company after you sold out to Renneckar?

A. The stock certificates were not good then.

Q. What did you get from Renneckar?

A. I think it was \$12,000.00.

Q. How did you get it, in money or check?

A. I don't know. As it came due I got my share. I don't know how he paid Wagner. I got my share.

Q. You know you got your money and that is about all you know??

A. That is about all.

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And further, the respondent, to maintain the issues on its part, called the witness T. P. WAGNER, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. T. P. Wagner.

Q. Where do you live?

A. New Philadelphia.

Q. How long have you lived there?

A. About 32 years.

Q. You may state whether or not you were ever interested in The Orrville Light, Heat & Power Company?

A. Yes, sir.

[fol. 80] Q. State whether or not you were one of the organizers of that company?

A. Yes, sir, I was.

Q. Who was John A. Wagner?

A. My father.

Q. John Wagner?

A. My brother.

Q. Did you know David King?

A. Yes, sir.

Q. And George King?

A. Yes, sir.

Q. State whether or not the five of you incorporated this Light, Heat & Power Co.?

A. Yes, sir.

Q. How long were you connected with this company?

A. From 1893 to the time we sold to Rennekar, that was about 1907.

Q. If you know the fact, you may state whether or not The Orrville Light, Heat & Power Company took over the plant and property that was originally constructed by Ansel P. Gans and Mellville D. Wilson?

A. Everything they had we took over.

Q. For a while were you secretary of this Orrville Light, Heat & Power Company?

A. Yes, sir, from 1895 on.

Q. Any minutes kept of the stockholders of that company?

A. Yes, sir.

Q. Do you know what became of them?

A. No, sir, my father had charge of those.

Q. Is he now living?

A. No, sir.

Q. How long did you continue to have an interest in the Orrville Light, Heat & Power Co.?

A. From 1893 to the time we sold out in 1907.

Q. During that period of time, state whether or not this plant was operated in the Village of Orrville?

A. Yes, sir.

[fol. 81] Q. Did anyone else during that time operate any light plant?

A. No, sir.

Q. The streets and public places of the Village were not used by any other company in the Village than the Orrville Light, Heat & Power Co.?

A. No, sir.

Cross-examination.

By L. R. Critchfield:

Q. This franchise of 1892 was given to Ansel P. Gans and Mellville D. Wilson, wasn't it?

A. Yes, sir.

Q. You people, the Orrville Light, Heat & Power Co., did not get the franchise from the time that the Gans and Wilson franchise was given until 1902, did you? At the end of the ten years?

A. We simply took over what they had.

Q. Did you get a written assignment?

A. I can't say as to that, only I know all the papers they had were turned over to us.

Q. Did the directors of your company take any official action in buying out Gans & Wilson?

A. The time Gans & Wilson were bought out we were not incorporated at that time.

Q. When were you incorporated?

A. 1893, Feby. 3rd.

Q. When was Gans & Wilson bought out?

A. They were bought out in 1892.

Q. How long did Gans & Wilson run that lighting plant?

A. I can't say.

Q. Not after you were incorporated?

A. No, sir.

[fol. 82] Q. After you were incorporated, was any official action taken by the Village of Orrville before 1892?

A. I cannot say.

Q. What was done by you men was all done without the knowledge or consent of the Village of Orrville?

A. There was no objection made.

Q. You never consulted the Village of Orrville in your transactions?

A. There was no reason to because there was no question raised about it.

Q. You did all on your own hook and Orrville was not consulted?

A. I can't say as to that, some of the officials may have consulted them. My father might have done it.

Q. Who was secretary?

A. I was there from 1895.

Q. Who was secretary before that?

A. My brother, John.

Q. Where is he?

A. Cleveland.

Q. Did he keep the books?

A. I don't think so.

Q. Did you keep much books?

A. They kept them at Orrville and the report would be sent to father, who would take care of them.

Q. You don't know what record was kept on your books outside of bills payable and receivable?

A. They were kept at Orrville.

Q. Did you attend the directors' meeting of the Orrville Light, Heat & Power Co.?

A. Yes, sir.

Q. Where was it held?

A. At Dover, usually.

Q. Were the books brought down there at that time?

A. Yes, sir.

[fol. 83] Q. Do you remember of them being there at Dover at directors' meetings?

A. Yes, sir.

Q. You can't tell us what was in the books of any purchase from Gans and Wilson?

A. No, sir, not in the secretary's books.

Q. When you bought out anybody it was done by buying his shares of stock?

A. I was never connected with the plant until it was reorganized.

Q. There was nothing said about a franchise?

A. Anyone buying stock would want to know if they got a franchise. If they would not have had they would not buy any stock in it.

Q. You told them you had a good franchise?

A. That was what I was told; a good franchise, a perpetual.

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And, further, the respondent, to maintain the issues on its part, called the witness CLARA M. BARKEY, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. Clara M. Barkey.

Q. What was your maiden name?

A. Postlewait.

Q. State whether or not your father and uncle were interested in the Orrville planing mill?

A. They were the owners.

[fol. 84] Q. Was your father or uncle a member of the Council at that time?

A. Neither one.

Q. Do you recall that the lighting plant was built near the property of the planing mill?

A. Yes, sir.

Q. For a period of time, possibly from 1892 to 1902, you had charge of some of the books?

A. Yes, sir.

Q. Do you know whether or not any other lighting company was operating in the Village at that time?

A. No, sir.

Q. Do you know whether or not rental was paid the planing mill for that lighting plant at that period of time?

A. Yes, sir.

Q. Do you know of the execution of deeds from the planing mill to the Orrville Light, Heat & Power Co.?

A. This deed at this time, this man was not my uncle; he was a partner of my father. They executed a deed to the Orrville Light, Heat & Power Co. for the sale of land.

Q. That was in 1902?

A. Yes, sir.

Q. Subsequently, about 1911, do you know whether another deed was executed and delivered?

A. Yes, sir, a small parcel of land was executed to give them a driveway near their plant.

[fol. 85] And, further, the respondent, to maintain the issues on its part, called the witness D. I. RENNECKAR, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. D. I. Renneckar.

Q. Where do you now reside?

A. Canton.

Q. How long have you resided there?

A. Between eight and nine years.

Q. Were you at any time interested in the lighting property at Orrville, Ohio?

A. Yes, sir.

Q. When? How did you become interested?

A. From 1907, July 1st, until March, 1913, March 13th.

Q. When you went there in 1907 what kind of a property was there; was their lighting plant operated for public and private lighting?

A. Yes, sir.

Q. How many plants were there in Orrville then?

A. One.

Q. Who operated that plant prior to your taking an interest in it in 1907?

A. The Orrville Light, Heat & Power Co.

Q. When you bought it what interest did you acquire in it?

A. The entire plant.

Q. How did you acquire that interest, from whom?

A. From the Orrville Light, Heat & Power Co., J. A. Wagner as president.

[fol. 86] Q. You may state whether or not you then took over that property and operated the same?

A. Yes, sir.

Q. For what period of time?

A. About 6 years.

Q. During that period of time state whether or not you had any negotiations with the Council of the Village of Orrville?

A. Yes, sir.

Q. When you took over that property and while you operated the same, during that period of six years, you may state, if you know, by what right or under what grant or privilege you operated the same?

A. J. A. Wagner presented to me what he supposed to be or stated to be a franchise before I bought it. I saw that. Then I also operated under an ordinance such as our time contract, a five-year period contract.

Q. Mr. Wagner gave you a certain instrument, do you remember the date?

A. It was considered a franchise.

Q. Do you remember the date of it?

A. 1892.

Q. You also say you operated under a time contract, just what do you mean by that?

A. An ordinance for the period of time given for the privilege of operating. I considered it an ordinance stating the time period giving the price of lighting and so forth.

Q. Did you then sell this property?

A. Yes, sir.

Q. When you sold it you may state whether or not you filed an application with the Massillon Company before the Public Utility Commission at Columbus?

A. Yes, sir.

Q. You may state whether or not you attended a hearing there?

A. Yes, sir.

[fol. 87] Q. If you know, you may state whether or not an order was made authorizing the sale of it and the purchase of that property?

A. Yes, sir.

Q. Following that order you may state whether or not you executed and delivered a deed for the transfer of this property?

A. Yes, sir.

Q. You may state whether or not following the order made by the Public Utilities Commission, you did transfer any rights or privileges to The Massillon Electric & Gas Company?

A. Yes, sir.

## Cross-examination.

By L. R. Critchfield:

Q. When did you say you bought out the Electric Light and Power Co.?

A. The first day of July, 1907.

Q. When was the contract ordinance given to you?

A. An unexpired — went in when we bought the plant.

Q. How long had it to run yet?

A. It had run between two or three years; probably had three years to run when we bought it.

Q. You bought it shortly after the contract ordinance was passed?

A. Probably two years.

Q. You bought it from the Orrville Light, Heat & Power Co.?

A. Yes, sir.

Q. Did you see the ordinance under which they were operating?

A. Yes, sir.

Q. Did you notice in that ordinance the ordinance was confined to The Orrville Light, Heat & Power Company, and not any assigns or successors?

[fol. 88] Objected to.

A. I can't say I did.

Q. How did you buy this from the Orrville Light, Heat & Power Co.? What proceedings were had?

A. We got together on price and terms and agreed to meet at a certain date and make a deed, and we fulfilled our part of the contract and they gave us a deed.

Q. Any other papers?

A. Only what the deeds called for.

Q. The deed was the only paper?

A. Yes, sir.

Q. That was to you as an individual, to D. I. Renneckar?

A. Yes, sir.

Q. You ran the plant up until about 1910 or 1912?

A. About 1913, in March.

Q. This five-year period ran out in July, 1912, do you recall that?

A. Probably it did.

Q. Before that some time you got another contract with the Village for five years or more?

A. Yes, sir.

Q. Do you recall that that contract you got beginning in 1912 was to D. I. Renneckar as an individual?

A. I don't remember what it was.

Q. You go down to the Public Utilities Commission and get leave to sell out to The Massillon Electric Light Co.?

A. Yes, sir.

Q. You turned over possession to the Massillon company?

A. Yes, sir.

Q. When you were running this plant, where did you get your electricity?

A. We manufactured it on the ground.

Q. Near the planing mill?

A. Yes, sir.

[fol. 89] Q. So long as you ran it, did you manufacture electricity there?

A. Yes, sir, toward the latter part of the period The Massillon Gas & Electric Company there was an option given. I ran the plant a few months that they furnished the current. I got the proceeds just the same.

Q. It was not manufactured by the Massillon company on the ground in Orrville?

A. Just as soon as they were ready to furnish current they took the plant over, and there was a period between the time we sold to the Massillon Gas until they got their lines there that I ran the plant and we manufactured our own current there but they were really the owners of it.

Q. What ordinance or franchise do you claim you were operating under when you were operating the plant?

A. The rights that were turned over to us from the Orrville Light, Heat & Power Co.

Q. What rights was that?

A. The ones we have just been speaking of.

Q. When were they granted to anybody?

A. I don't know the date.

Q. After you sold out to the Massillon Company through an act of the Public Utilities Commission, did the Massillon Co. furnish electricity in the Village of Orrville?

A. Yes, sir.

Q. Where did they procure that?

A. At Massillon.

Q. What became of the central manufacturing plant in Orrville?

A. I don't know.

Q. Did that cease to operate for the manufacturing of electricity while you were in Orrville?

A. They were operating in some shape or other.

[fol. 90] Q. Manufacturing electricity?

A. I presume so.

Q. Were they not getting any on an outside line from Massillon?

A. I don't know where they got it. To the best of my knowledge I could not say.

Q. Were you around that plant any?

A. We lived in Orrville two years after.

Q. You went to the plant afterwards?

A. I went by it.

Q. After you sold out to them all your connection of the lighting with Orrville ceased, did it?

A. Yes, sir.

Q. Did you receive cash or the equivalent when you sold out, or did you receive stock in the company?

Court: That is immaterial.

Q. While you were operating this plant did you receive any rights in any way through the Village Council of Orrville?

A. We had the contract renewed for a five-year period.

Q. Beginning in 1912?

A. I believe so.

Q. That is the only thing you received from the Village of Orrville?

A. Yes, sir.

Q. What did you receive when you bought from the Orrville Light, Heat & Power Company? What did you receive in the way of a written contract? I believe you stated nothing but that deed, is that correct?

A. Yes, sir, the deed stated what I received. I received a copy of the franchise. It was said to be a copy of the franchise, and I afterwards investigated and found it was.

[fol. 91] Q. You compared it with the original?

A. Yes, sir.

Q. Who had that franchise been granted to?

A. I believe it was Gans and Wilson.

Q. Do you remember the time, Feb. 1, 1892?

A. No answer.

Redirect examination.

By C. H. Henkel:

Q. Judge Critchfield inquired of you under what franchise or ordinance you claimed the right to operate in the Village of Orrville, Ohio; I would like to inquire in addition to that whether or not you claim that while you operated there you did or not operate under the grant of February 1, 1892?

A. I did.

Q. Can you state to the court what the Orrville Light, Heat & Power Co. and yourself intended when in the instrument of conveyance between the Orrville Light, Heat & Power Co. and D. I. Renneckar it was prepared for the conveyance of a franchise, under which said grantors operated in said Village, what the parties thereby intended?

Objected to; overruled; exceptions.

A. They intended to convey the same.

Respondent rests.

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[fol. 92] Thereupon the relator, to maintain the issues on its part to be maintained, called the witness GEORGE MARTIN, who, being first duly sworn, testified as follows:

Direct examination.

By A. H. Etling:

Q. You may state your name.

A. George Martin.

Q. Where do you live?

A. Columbus, Ohio.

Q. In what employment are you?

A. I am with the Snook-Hillhouse Company, Consulting Engineers.

Q. How long were you employed by that company?

A. Approximately a year.

Q. In what work have you been engaged by the Snook-Hillhouse Co. in particular?

A. In appraisals, valuations and rate cases before the Public Utilities Commission.

Q. How long have you been practicing in that capacity before the Public Utilities Commission?

A. I was employed as appraisal engineer with them for about five years.

Q. Prior to your employment now?

A. From 1914 to 1919.

Q. During that employment what work in the appraisal of electric properties did you engage in and where?

A. I was engaged in the appraisal of the Cleveland Electric Illuminating Co. at Cleveland, Ohio, while employed as appraisal engineer with the Public Utilities Com [fol. 93] mission, both in field work in collecting the data relative to an inventory, and later after that was finished in compiling and summarizing the field work and applying prices.

Q. Was there any other work that you did besides that?

A. In electric lighting property valuation I was employed by the Metropolitan Edison Company at Reading, Pennsylvania, as appraisal engineer in charge of the application of prices to the inventory which was previously prepared.

Q. Any other experience along this line that you have not mentioned?

Henkel: We admit the witness is properly qualified.

Book marked Relator's Ex. 1 offered in evidence and objected to by Respondent; objection overruled; exceptions to this line of testimony.

Q. In your employment with the Snook-Hillhouse Co. did you make an appraisal of the property of The Ohio Public Service Co. in the Village of Orrville?

A. Yes, sir.

Q. When was that?

A. Approximately the middle of March this year.

Q. Did you do that work yourself or supervise it?

A. I did part of the work, and all the work was under my supervision.

Q. You were in Orrville?

A. Yes, sir, during the period that the inventory was made and work done in the office.

Q. Following that what did you have to do with that?  
[fol. 94] A. Part of that work was done by myself personally, and all of it under my direct supervision.

Q. After this appraisal was made, what did you do in the way of investigation and comparison and correction?

Henkel: We will admit that he did those things and that the statements he makes are correct.

Q. Is this appraisement a true and correct appraisement of the property of The Public Service Company in Orrville, Ohio?

A. It is to the best of my knowledge and belief.

Relator's Exhibit 1 introduced in evidence; objected to; overruled; exceptions.

Q. What is the value of property used and useful as shown in this appraisement by The Ohio Public Service Company within the Village of Orrville, Ohio?

A. That figure as shown on Sheet 1 of the appraisal and the present value amounts to \$11,986.00.

Q. In that property, included in that appraisal value of \$11,986.00, does that include the value of the substation situated in the southern part of Orrville?

A. It does, yes, sir.

Q. Does that sub-station supply any other users of electric current than people within the Village of Orrville?

A. Yes, sir, it does.

Q. What per cent of the capacity of the sub-station is used by others than inhabitants of the Village of Orrville?

Objected to; overruled; exceptions.

[fol. 95] A. About fifty per cent.

Q. By whom is that fifty per cent used?

A. By the creosote plant.

Q. Is that located within the corporate limits of Orrville?

A. No, sir. It is outside.

Q. If you will, explain to the court what is the valuation of the sub-station found on page 3?

A. The sub-station land, present value is \$100.00; sub-station structure \$1,156.00; sub-station equipment \$2,704.00; total value of the sub-station land, structure and equipment \$3,960.00 of which about 50 per cent is used and useful for the operation of the creosote plant outside of the city limits.

Q. So that to make a proper deduction from the value given for property used and useful in the Village of Orrville what balance would be left?

A. Deducting 50 per cent approximately \$2,000.00 deducted from the present value shown on page 3 would be approximately \$7,000.00.

Q. You made an appraisal of this property in the Village of Orrville; were you there personally?

A. Yes, sir.

Q. What is the value of the property which the Ohio Public Service has now in Orrville which would be fit for use in public lighting?

Objected to; overruled; exceptions.

A. The value of the plant inside of the corporation used and useful as shown on page 1 of the valuation is \$11,986.00, that is the total plant, including all overhead expenses.

[fol. 96] Q. What is the value of the property which the Ohio Public Service Co. has now in Orrville which would be fit for public lighting?

A. The total amount of the plant not used inside of the corporation of Orrville is shown on page 17, and the present valued amount is \$7,181.00.

Q. I wish you would tell the court not the portion of the plant which is there for public lighting not being used, but how much property there is there to carry out this original contract for public lighting?

Objected to.

Q. For public lighting, street lighting?

Objected to.

A. That is shown on page 18. The first item of municipal lighting is account No. 522, which amounts to \$500.00, and the next account is No. 552—\$1,104.00. The last item,

No. 561, is \$588.00, making a total of \$2,192.00. Present value would be \$1,234.00.

Q. Of that amount how much is used and useful?

A. None of it is used and useful at present.

Q. What is the condition of the plant as you saw it there as to poles and wire?

Objected to; overruled; exceptions.

A. The municipal lighting portion of the plant not being used, the arc supports and span wires are some of them down and in bad shape. Also the wire which transmits the current to these lamps is not in good shape, the insulation is bad, and there are portions of this plant where several spans are missing so that it is not in operating condition.

[fol. 97] Q. What as to poles that have no wires on them at all?

A. There are a number that have no wire on at all or no fixtures of any kind; I have made a list of that, if you wish I can tell you. Some of the streets where there are no wires or fixtures on the poles are in West Oak Street, Garfield, South Main, East Oak Street, South Walnut Street, Westwood Avenue, Mohican Street, West Church Street, North Walnut Street, South Elm Street, North Main Street, Orr Street, Park Street, Pike Avenue, West Market Street, South Vine Street, Waverly Street and Mineral Springs Street, and the total number of poles in these streets which have no wire or fixtures amount to about twenty-five per cent of the entire pole and wire plant.

Q. Are there places where poles are missing and have been removed?

A. I don't recall whether there are any poles missing or not.

Q. What method of lighting is this street lighting system arranged for; what kind of lights?

A. I believe it is a series of arc lamps.

Q. Any are lights there now?

A. No, sir.

Q. Any are lights anywhere on the property of The Ohio Public Service Co.?

A. There is some in the storehouse at the power plant.

Q. What about the use of arc lights as to whether they are in use now?

A. None at present.

Q. Are they used anywhere?

A. No, sir.

Q. They are out of date?

A. Yes, sir, they are an obsolete type.

[fol. 98] Q. Are these wires and supports hanging over the streets in Orrville?

A. Yes, sir, in some places the arcs are across street intersections.

Q. In your investigation what would you say as to them being dangerous or not as you find them at places?

Objected to; overruled; exceptions.

A. If those are wires are carrying current they are very dangerous; even if they are not, they may fall down and interfere with traffic.

Q. Did you find some of those wires carrying current?

A. I did not make a test.

Q. The street lighting system, did you find some of those wires carrying current?

A. I made no test for that.

Q. What about the danger from the wires from the standpoint of insulation, and their swaying on the private lighting system?

A. If they should come in contact with a private lighting wire where the insulation is bare, it would cause a short circuit and destroy some of the property.

Q. Are there places where this is not being carried on poles belonging to the Ohio Service Co.?

A. Yes, sir, some places where the system is conducted on telephone and municipal lighting poles.

Q. At those points their own have been removed?

A. If there ever have been any there. I don't know.

[fol. 99] Cross-examination.

By C. H. Henkel:

Q. The Village was operating a lighting plant when you were there making your investigation?

A. I believe so.

Q. Do you know how long the municipality was operating that plant?

A. I do not know.

Q. When you made this appraisal and attempted to fix the value of this property, you took things just as you found them?

A. I tried to, yes, sir.

Q. So far as fixing the valuation or fixing the appraised value of the property, it makes no difference as to what is used or useful for a particular service?

A. We have set it up both used and useful and not.

Q. For the purpose of appraisal for valuation it is not necessary?

A. It is usual to distinguish between them.

Q. Do you not only encounter the term "used and useful" for rate-making purposes?

A. The uniform classification accounts for electric utilities by the Public Utilities Commission of Ohio employs a phrase of that character.

Q. Is not that for the purpose of allocating the property to determine your domestic and commercial rates?

A. I merely stated that this division was set up in here and the classification made in that manner, used and useful and not used and useful inside the corporation.

Q. That is, your set up is made according to suggestions or directions, is that not true?

[fol. 100] A. There is no suggestion made by anyone except it was thought best to set it up that way in our office.

Q. Suppose this court was saying to you they wanted to know the value of that property, it would be necessary to set up used and useful, you could go to page 32 and you would have your present value?

A. Yes, sir.

Q. Property has a certain value whether used for a particular purpose?

A. Yes, sir.

Q. Do you know in how many instances the Village is also using some of this company's property, poles and wires for the transmission of their electricity?

A. I made no investigation of that phase of it.

Q. You know it to be a fact that that is not true?

A. No, sir not of my own knowledge.

Q. Do you know where the poles you testified in some places some poles were missing; in those places did you find other poles were placed by the municipality?

A. I do not recall anything of that sort.

Q. The condition that you have found this property in was a natural one from years of disuse; isn't that true?

A. Possibly so.

Q. Had the Ohio Public Service Company been permitted to furnish current for public lighting, you don't know what type or system it would now be using, do you?

Objected to; overruled; exceptions.

A. I believe it is now using a three-phase system.

Q. When you said in chief that this system was obsolete, you mean it is obsolete at the present time? You do not have in mind at the time it was discontinued by the municip- [fol. 101] pal lighting plant?

A. I believe it was used in connection with the plant.

Q. Their system is such it could provide for any style in municipal lighting?

A. I presume so.

Q. Is there any disadvantage in not having a central plant within the corporate limits of a municipality?

Objected to; overruled; exceptions.

A. It is probably an advantage for a corporation like the Ohio Service Company to have a plant outside the city.

Q. The service to that community can be distributed just as well over a high transmission line as from a central plant?

A. Certainly.

Q. Did you take into consideration at all that there would be a value to this property as a going concern?

A. No, sir, that was not included in this valuation.

Q. Is not that a proper item?

A. For rate making purposes.

Q. Did you take into consideration that it cost this company any money to establish the business it was enjoying up to 1917?

A. We were interested in the present plant.

Q. You did not attempt to look into the past at all as to the value of that property, or the number of consumers?

A. No, sir.

Q. You are looking at it now in its present condition?

A. Yes, sir.

Q. Who pointed out to you this property?

A. I do not understand your question.

Q. Who pointed out the poles and wires to you?

[fol. 102] A. I believe they had a mark on it which designated the ownership.

Q. Is that the only way you had of arriving at the property belonging to The Ohio Service Company?

A. That was one of the ways.

Q. Did you have any other?

A. I believe the circuits could be traced from the substation.

Q. Were they?

A. I think they were, yes sir.

Q. Did you take into consideration that if there was no competitor in that particular field what the value of the Ohio Public Service property might be in Orrville?

A. No, sir, we made a valuation of the physical plant.

Q. Do you know from your experience that a commission with a competitor in the field, where there is a demand that can be supplied by one operator in that field immediately interferes with the business of the one originally in the field?

A. No answer.

Q. This particular field could be supplied by the one company?

Objected to; sustained; exceptions.

Redirect examination.

By A. H. Etling:

Q. As to the question of the value of property not used or useful if not used or useful in this business, it could be sold and its value obtained?

A. Yes, sir, it could be sold for what they could get for it. We put on a value there it would cost to reproduce the plant at the present day, less its depreciation.

[fol. 103] Q. Does that value of \$11,000.00 include both public and private lighting within the village of Orrville and equipment?

A. This value of \$11,000.00 approximately shown on page 1, is the plant that is used and useful inside the corporation.

Q. It includes public and private lighting?

A. Mostly private lighting.

Q. All the private and public lighting used and useful?

A. Yes, sir.

Q. Does your appraisal show the amount of the investment in this property?

Objected to.

Recross examination.

By C. H. Henkel:

Q. Exhibit 1 is the usual statement prepared for rate making purposes; isn't that true?

A. Possibly rate making purposes would go a little farther than that, a balance sheet and expenses.

Q. You would likely if this was before the Public Utilities Commission in addition to Exhibit 1, you would have given the concern a value to the cost and expense of outaging the business?

A. In some cases there is a per cent added for that.

Q. Let us go to this other question again that we have been discussing and that is this, as you appraised this property you looked at it as bare physical property, is that not true?

A. The physical value is shown on page 1. It is shown towards the middle of that set up.

[fol. 104] Q. You carry nothing into this valuation of a going concern, do you?

A. There is nothing on here set up as such.

Q. Did you hear the statement made by Judge Pardee a moment ago?

A. Yes, sir.

Q. His conclusion and deduction is correct, is it not, as to the physical plant?

A. There are added to the plant values such as engineering contingencies, tool and supply expense, a sub-total made to that for the total physical plant. The figures for the total plant, \$13,518 for reproduction value, is obtained from page 3, which is a summary of the various accounts which go to make up the accounts; to that add contingencies, tool and supply expense which are a part of the physical plant and that makes a total reproduction of \$15,276. Then the

further overhead construction, taxes, working capital and supplies, so we enter the grand total of the plant inside the corporation as \$17,338.

Re-redirect examination.

By A. H. Etling:

Q. On the valuation of poles, do you take into consideration the labor for setting that pole?

A. Yes, sir, material, price, plus freight, cartage, and all the labor connected with it.

Q. That is true of all the equipment?

A. Yes, sir.

Thereupon court adjourned until 9 A. M. next day.

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At 9 A. M. the following day court opened.

[fol. 105] And, further, the relator, to maintain the issues on its part, called the witness W. R. COOK, who, being first duly sworn, testified as follows:

Direct examination.

By A. H. Etling:

Q. You may state your name?

A. W. R. Cook.

Q. Where do you live?

A. Orrville, Ohio.

Q. By whom are you employed?

A. The Village of Orrville.

Q. In connection with the electric light plant?

A. Yes, sir.

Q. How long have you been employed by the Village of Orrville?

A. Fourteen years.

Q. In what position were you employed by the Village of Orrville 14 years ago?

A. As superintendent of the water works.

Q. When did you have something to do with the electric light plant?

A. In 1916.

Q. In what capacity?

A. Superintendent.

Q. You have been superintending the light plant since that time?

A. Until a couple of months ago.

Q. Have you examined this appraisal that we presented the court yesterday?

A. I have.

Q. What would you say as to the appraisal of property in that appraisement? As to whether it was high or low or proper?

A. Some parts seems to be high, and some parts seems to be low.

[fol. 106] Q. What portion especially is priced high?

A. They have an engine and a generator and some boilers I would—

Court: What do you claim for those?

Etling: We want to show to the court through Mr. Cook that the appraisal that has been presented is not lower than the real value of the property.

Q. If you can, state what is the real value of the whole property?

A. It would be salvage value.

Q. You have noticed in this appraisal, it has been appraised at a certain fixed sum at eleven thousand nine hundred and some dollars; is that appraisal high or low?

Objected to; sustained; exceptions.

Q. Is that a fair appraisal?

Objected to; sustained; exceptions.

Q. What in your opinion is the fair total appraisement of that property?

A. As I stated before, I believe it balances up correctly; taking it all.

Q. Can you give the value in figures?

A. I can't off handed.

Q. You did look over this appraisal?

A. Yes sir.

Q. From the figures you saw at that time, you thought it would balance up fair?

A. Yes sir.

Q. Will you tell the court the condition of the poles and wires of the Public Service plant in Orrville?

Objected to; sustained; exceptions.

O. State to the court as to the condition of the poles as being *as being* proper and poles missing; what has [fol. 107] happened to the plant?

A. The depreciation has been very great, and the length of time it stood idle and the parts they have not used. A number of poles have been removed by their consent. We have removed some of them when they became dangerous. I have sent men out to do it.

Q. State to the court about poles falling of their own accord across street live wires?

A. That has happened in three or four instances and we fixed them up for them because they did not maintain a lineman all the time. He worked eight hours on the railroad and the balance of the time for the Public Service Company. He could not get to it and we went out to remove the danger for them.

Q. State to the court whether the lines are continuous on the poles?

A. Some of them are and some of the spans are cut out and abandoned.

Q. For instance, on Walnut Street, the length of about how far would you say in Orrville the length of the street north and south, the whole way along the street?

A. On South Walnut Street it is abandoned; on North Walnut Street it is still in use.

Q. What distance?

A. About four blocks in use.

Q. How far not in use?

A. Probably eight blocks.

Q. When you said four blocks in use, what kind of use is that?

A. They had a line where they were running to the creamery and the cement factory down there that still has power in it.

Q. Are they furnishing current to anybody there?

A. No, sir, but the line is still energized.

[fol. 108] Q. What would you say about the system on South Main Street?

A. From the square they have no line energized at the present time. It has been taken down, most of it.

Q. What about poles on South Main Street?

A. One here and there.

Q. Without wires?

A. Mostly.

Q. What on North Main Street?

A. North of the square they have three poles at Arch Street. They are still standing with the lines on it, but no current going through them.

Q. Take North Vine Street, what is the condition there?

A. From Main Street on North Vine Street to Water Street their line is energized; no service on it.

Q. What is the condition on South Vine Street?

A. They have no line on that street only at one point; that line intersects South Main Street one block; that is energized.

Q. What is the condition of the line on West Market Street?

A. It is about the same all over, only that is a higher line.

Q. If you can, state to the court how much service there is in Orrville from this whole system?

A. I am unable to do that. I never kept track of their business that way.

Q. You have never counted them up?

A. No, sir, not accurately.

Q. State to the court what difference, if any, there was in the efficiency of the service before the abandonment of [fol. 109] the central plant and after the abandonment of the central plant?

Objected to; overruled; exceptions.

A. I think you have a complete record of the outages.

Q. The comparison before and after?

A. It was always an advantage in having a central plant, because your plant is centrally located. You will not have as good service in long transmission; you can't get to it as quick. Before that time there was quite a good deal of trouble, I never investigated it. The service was not as good.

Q. During this period from 1913 to 1917 did you as superintendent of that plant have communication and conversa-

tion with employees of the Massillon Electric and Gas Company relative to the inefficient service at any time?

Objected to; sustained; exceptions.

Q. What conversation, if any, did you have with the employees of the Massillon Electric and Gas Company relative to their service in Orrville after the abandonment of the central plant?

Objected to; sustained; exceptions.

Q. And after you became superintendent of the municipal light plant?

Objected to; sustained; exceptions.

Q. Has this central plant as originally built in Orrville been abandoned for use in lighting?

Objected to; question withdrawn.

Q. Describe the condition of the central plant at Orrville [fol. 110] at the present time?

A. It has been abandoned and parts of it has been removed and parts of it is there.

Q. Tell the court what parts are there?

A. Engine, generator, boiler feed pump and part of the switchboard.

Q. In what condition are they?

A. Very poor condition.

Q. Are they fit for service at all?

A. The plant has deteriorated from not being in use and they have an engine and generator, part of a switchboard, two boilers, a feed boiler, feed pump still in the building.

Q. Any employes around there?

A. One employe and the building stands open.

Q. What do you mean?

A. The doors open and the windows mashed in.

Q. Is this machinery that you have mentioned connected with the lighting system of Orrville?

A. Not at the present time.

Q. Is it a single phase system?

A. Yes, sir.

Q. Could that machinery be connected with the system that the Ohio Public Service Company now have?

A. It could for lighting purposes only.

Q. What phase system does the Ohio Public Service Company have on their poles and lines now?

A. Three phase.

Q. Could this one phase system be connected with this?

A. Yes, sir, it would be used for lighting only.

Q. What is the building used for?

A. It is used for a storehouse.

Q. For what?

[fol. 111] A. Anything that they have in the line of fixtures. I don't think they will have much of anything now.

Q. How long has this building and machinery been in the condition you have stated, disconnected?

A. I am unable to give you the date on that.

Q. How many years back are you there? Has it been since they brought the power in from Massillon?

A. I think it would be, yes, sir, but I am not positive about that.

Q. Has it been a number of years? Since they brought it in there and put in the three phase system?

A. Yes, sir.

Q. Did you notice a hitching post and ring in front of the place?

A. Yes, sir.

Q. Would that indicate how modern the plant is?

A. No answer.

Q. From where does the current come that is supplied by the Ohio Public Service Company at the present time?

A. They have a sub-station in the southern part of Orrville. Then they have a transmission line that comes from Massillon.

Q. Through what points does that transmission line pass?

A. I don't believe it passes directly through any.

Q. What towns are furnished that current?

A. Dalton, Ohio, receives current from it.

Q. Any other place?

A. Not that I know of.

Q. Does this through line from Massillon furnish any other place?

A. Yes, sir. Wooster, Fredericksburg, Shreve and surrounding towns here, Smithville and Apple Creek.

[fol. 112] Q. Do you know whether or not that line goes through Wooster and beyond Wooster?

A. I don't.

Q. The points that you have named aside from the Village of Dalton, are what direction on the line from Orrville?

A. Wooster is directly west.

Q. They are all west?

A. Yes, sir.

Q. Any other towns besides Dalton that are furnished east?

A. I believe Greenville and West Brookfield.

Q. How about North Lawrence?

A. I believe they furnish Bodill.

Q. Would the abandonment of the lines in Orrville affect the service by this company of these other towns?

A. I don't think so. That would not have any effect on it.

Q. Would they have to build a line around Orrville or anything of that kind?

A. No.

Q. A sub-line to Orrville?

A. Yes, sir.

Q. Orrville was not on the main line?

A. No, sir.

Q. What distance is it off from the main line?

A. Very close to three-quarters of a mile.

Q. In that three-quarters of a mile there are no towns that they serve?

A. No, sir.

Q. This line south of Orrville runs more or less west from the sub-station below Orrville?

A. Yes, sir.

Q. While the line running into Orrville runs in what direction?

A. North.

Q. At right angles to the other line?

A. Yes, sir.

Q. In order to supply what is known as the creosote plant outside of the corporation of Orrville, would it be [fol. 113] necessary to build a new line from the main line

south of Orrville north, or could it be carried over the line as it exists now outside the municipality?

A. Yes, sir.

Q. So that the wood preserving plant could be served without the construction of a new main line south? From the station south of Orrville at the Wheeling & Lake Erie?

A. They could build one across there.

Q. Is there not one built there now to the Village of Orrville?

A. Yes, sir, to the Village of Orrville.

Q. At the present time the creosote plant is furnished, then the Village of Orrville?

A. Yes, sir.

Q. It could be furnished direct from this line south of Orrville?

A. Yes, sir.

Q. Going a little east from this line to the corporation line at Orrville and then north?

A. Yes, sir.

Cross-examination.

By C. H. Henkel:

Q. You say you were employed by the Village of Orrville for the last 14 years?

A. Yes, sir.

Q. Did you know that in 1910 the Orrville Light, Heat and Power Company was furnishing current for public lighting and private consumers in Orrville?

A. Yes, sir.

Q. Thereafter, and on or about 1913 the Massillon Electric and Gas Company furnished current to public lighting and private consumers in the village?

A. Yes, sir.

[fol. 114] Q. It had at that time a system available and which was in use in furnishing that service, did it not?

A. Yes, sir.

Q. The village constructed a lighting plant starting in 1914, which was completed in 1916?

A. Yes, sir.

Q. And the current was turned on in 1916?

A. Yes, sir.

Q. You then became superintendent of the light plant?

A. Yes, sir.

Q. Thereafter, the Massillon Electric and Gas Company no longer operated public lighting in the village, did it?

A. They did for a while until their contract expired.

Q. If the Massillon Company did continue it was for a brief period of time?

A. Until their contract expired.

Q. Thereafter, the village furnished the current for the municipal lighting?

A. Yes, sir.

Q. The Village also took on private consumers?

A. Yes, sir.

Q. And has since that time put forth every effort to take on private consumers?

A. Yes, sir.

Q. The Ohio Public Service Company has ever since 1921 had property in the Village of Orrville?

A. Yes, sir.

Q. And has had consumers there?

A. Yes, sir.

Q. And has at least attempted to render a service to the consumers of the Village of Orrville?

A. Yes, sir.

Q. Your village plant has also used some of the property belonging to the Ohio Public Service Company and its [fol. 115] predecessors in the village? Poles, cross arms and other equipment?

A. There may be one instance where a gentleman's agreement between the local manager and myself in order to expedite matters.

Q. Also places where poles of the Ohio Public Service Company were setting that were then removed and poles placed there by the village?

A. No, sir.

Q. Where you have testified to several lines of the Ohio Public Service Company being at the present time out of use, in that particular locality the village has lines that it is now using for the same purpose, has it not?

A. Yes, sir.

Q. Your attention was directed to the outages; as I understand from your testimony you were not able to say to the

court whether or not the outages were due to the elimination of the central plant or other causes?

A. I don't recall how I did answer that question. I think I said you did not get as good service.

Q. I thought you said you did not know what caused the outages?

A. No, sir.

Q. You are familiar with the development of the arc and transmission of the electric current at the present time?

A. Yes, sir.

Q. At the present time the current is brought by the Ohio Public Company to Orrville over these high transmission lines, is it not?

A. They maintain a high transmission line.

Q. Did you know that the line was constructed for the purpose of rendering a service to the Village of Orrville and [fol. 116] the inhabitants thereof?

A. I never knew particularly that it was for that particular reason.

Q. Don't you know that the Ohio Public property stops near the Village of Orrville?

A. No, sir.

Q. Don't you know this is a line belonging to other people that was extended over there by other capital in order to get it from the Ohio Public Service Company?

A. I understand there was one built there recently.

Q. When you testified you did not mean to say that you knew who constructed these lines and that the Ohio Public Service Company is merely using a high transmission line into Orrville as part of the line that is extended on to Wooster or Shreve or some other place?

A. I don't know.

Redirect examination.

By A. H. Etling:

Q. Do you know as to whether the Ohio Public Service Company is furnishing current over these lines and to these cities that you mentioned?

A. Yes, sir, they are.

Q. Have you stated to the court in answer to Mr. Henkel's question as to whether or not you did have any knowledge

as to the cause of the outages in Orrville after the abandonment of the central plant?

A. Just from hearsay. I heard it was from accidental causes, the wind blowing over the wires.

Q. These exceptional outages occurred after the building of this long distance line?

A. Yes, sir.

[fol. 117] Court: Was the plant of this company at Orrville which is not now in operation, was that in operation when the city began the construction of its plant?

A. No, sir.

Q. How long a time before the city began the construction of its plant, was there agitation in the city for a municipal plant?

A. My recollection is it has been going on for a great number of years. The real climax was when the Massillon Electric had taken over the property of the Orrville Light, Heat and Power Company.

Q. When was that?

A. Nineteen thirteen. They boosted the rates. They started it.

Q. From that time on it was definitely settled that the city was to build its own plant?

A. They circulated a petition and nearly everyone they took it to signed it, and the council passed the necessary legislation.

Q. At that time this plant that has now been abandoned was in operation and furnishing electric energy to the inhabitants of that city?

A. No, sir, they had stopped the operation of that plant at that time and was furnished energy from Massillon.

Q. Did they stop the operation of that plant before it was very evident that the city was going to erect its own plant?

A. Yes, sir.

#### Recross-examination.

By C. H. Henkel:

Q. I asked you whether or not at the time the village constructed its light plant, if at that time the Massillon Electric and Gas Company was not furnishing a service to the [fol. 118] municipality by way of public lighting and the inhabitants of that community, and did you not answer yes?

A. Yes, sir.

Q. Wasn't the question put to you whether or not this company was rendering a service to the people of that community and the municipality itself at the time the village plant was constructed? I thought you said no?

A. No, sir.

And, further, the relator, to maintain the issues on its part, called the witness ALFRED JENNY, who, being first duly sworn, testified as follows:

Direct examination.

By L. R. Critchfield:

Q. You may state your name?

A. Alfred Jenny.

Q. You are clerk of the Village of Orrville?

A. Yes, sir.

Q. How long have you been clerk?

A. 12 years.

Q. That was during the time that the Massillon Electric & Gas Co. was furnishing electricity to Orrville?

A. Yes, sir.

Q. Have you any account during that period of the outages on the street lighting system of the Village of Orrville?

A. Yes, sir.

Q. In what form of memorandum have you to inform the court?

[fol. 119] (The Respondent admits, etc. This is contained in the agreed statement of facts.)

Q. You were a resident of Orrville before the Central lighting plant was discontinued in Orrville?

A. Yes, sir.

Q. You have been a resident since?

A. Yes, sir.

Q. State what was the difference in service rendered in street lighting before the central plant was discontinued and afterwards?

A. The service before was bad enough and it was worse after.

Counsel for Respondent asks that the answer be stricken out; sustained; exceptions.

Q. What kind of service did you have before the central lighting plant was discontinued in Orrville? Or, if you prefer, you can compare it but not in the same answer that you gave before?

A. The service before was tolerable.

Q. How was it after the central plant was discontinued?

A. It was not so good.

Q. What do you mean by that?

A. If you want me to say how I judged that I will do so. There were less outages deducted from the bills of Ren-neckar than from the Massillon Electric & Gas Co. The outages were greater as deducted from the bills of the Massillon Electric and Gas Co.

Q. This Exhibit Z will show what you mean by way of outages from the Massillon Co.?

A. Yes, sir, a complete record of it.

[fol. 120] Cross-examination.

By C. H. Henkel:

Q. You don't mean to tell us what the cause of those outages might be?

A. No, sir.

Q. You are not an engineer?

A. No, sir.

Q. You don't know what caused it?

A. No, sir.

Q. You have testified that certain outages allowed you have a voucher, I believe those vouchers show the amount paid to the Massillon Electric Co. for public lighting?

A. Yes, sir.

Q. From Feb. 2, 1914, up to and including July 2, 1917, do they not?

A. Yes, sir.

Q. During the time indicated on Exhibit Z the Massillon Electric & Gas Company was furnished service in Orrville, I believe?

A. Yes, sir.

Q. They were lighting the public streets in that time?

A. Yes, sir.

Q. Can you tell me what the total amount that was paid to the Massillon Electric & Gas Company during that time is from the vouchers?

A. I did not run it up.

Q. Could you, by adding them up?

A. Yes, sir.

Q. Will you add them up?

A. Yes, sir, I will. \$10,820.10.

Relator rests.

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[fol. 121] Thereupon the respondent, in reply, called the witness JOHN KLING, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. John Kling.

Q. Where do you reside?

A. Massillon.

Q. What, if any, position have you?

A. I am Assistant Secretary of The Ohio Public Service Co.

Q. How long have you held that position?

A. Since the organization.

Q. You may state whether or not you have in your possession the records of that company showing expenditures?

A. I have.

Q. Have you with you the record showing disbursements made on this Orrville property?

A. Yes, sir.

Q. I will also ask you to state whether or not you have made any investigation of the record and if from that investigation you are able to state what amount of money was expended by the Massillon Electric & Gas Company, predecessors of The Ohio Public Service Co., for the Orrville property?

A. Yes, sir, I have investigated.

Q. Will you kindly state the amount?

Objected to; overruled; exceptions.

Q. If you have that book here will you identify it and tell [fol. 122] by what that is known and from what page you get that item?

A. That record is the general ledger of the Massillon Electric & Gas Co. and the amount spent was originally \$21,251.00.

Counsel for Relator asks that the answer be stricken out; overruled; exceptions.

A. Eleven thousand dollars was paid in money and \$10,000.00 in bonds of the Massillon Electric & Gas Co.

Q. What, if any, other expenditures, as shown by the record, were made at that time or immediately after the acquisition of that property for the betterment and rebuilding of this Orrville company in Orrville?

A. There was a transmission line built in 1913 to supply Orrville, costing \$32,504.00.

Objected to by Relator and asks the court to strike the answer out; sustained; exceptions.

Q. You refer to a certain record, what is that?

A. The general ledger of the Massillon Electric & Gas Co.

Q. You may state whether or not you know it to be a record showing original entries or disbursements for property acquired or purchased by the Massillon Electric & Gas Co.?

A. Yes, sir, I do.

Q. Where is it kept?

A. In the office of the Massillon Electric & Gas Company.

Q. State, if you know, what company became the successors of the Massillon Electric Co.?

A. The Ohio Public Service Company.

Q. You may state to the court whether or not you know that record to have a record of the Massillon Electric & Gas Co.?

A. Yes, sir.

[fol. 123] Q. Did you have anything to do with the making of that record?

A. Nothing.

Q. Do you know from your own knowledge whether or not that is a record of the company and is an accurate record of the matters and things it attempted to show?

A. Yes, sir, I do. I was an auditor of The Ohio Public Service Co. In making an audit of the Massillon Electric & Gas Co. we went over all the old records.

Q. You did not check the entries out of the books as against the physical properties?

A. Yes, sir, I did on the purchase of material, stock and labor. I have investigated all those figures to see that the book entries were proper.

Q. May I inquire whether or not at the time you made that audit you did check over the record that now appears before you?

A. Yes, sir.

Q. Where did you find it?

A. At the Massillon Electric & Gas Co.

Q. Where has that record been since that time?

A. At the Massillon Electric & Gas Co.

Q. State whether or not you know of your own knowledge whether or not this high tension line was constructed for the purpose of rendering a service to the Village of Orrville and the inhabitants thereof?

A. Yes, sir.

Q. You may consult the records and ascertain and state what amount was expended for the construction of that line?

Objected to; overruled; exceptions.

[fol. 124] A. Thirty-two thousand five hundred and four dollars.

Q. Who was that paid to?

A. That was the cost of material, wire, poles, labor entering into the construction of the line from Massillon to Orrville.

Q. It was built for the purpose of supplying power and light to Orrville, but not the sole purpose?

A. At that time it was the sole purpose.

Q. Do you know that of your own knowledge?

A. I do.

Q. Reference has been made to a sub-station. You will consult the record you have and state to the court the amount that was expended for the building of that sub-station at Orrville?

Objected to; overruled; exceptions.

A. Sub-station, 1914, \$2,228.00.

Q. You may state whether or not since 1914 the Massillon Electric & Gas Co. and The Ohio Public Service Co. have expended any sums or amounts in the maintenance or upkeep of this property?

A. Yes, sir, we have.

Cross-examination.

By L. R. Critchfield:

Q. This ledger that you speak of here on page 217 there is some late writing and figures?

A. Absolutely not.

Q. "Cost of property" is later?

A. No, sir.

Q. I ask you if those figures, October 31st \$10,000.00, were put in there and placed there at the time it was all [fol. 125] put on?

A. Yes, sir, October 31, 1913. I investigated all the figures back and found it was issued then.

Q. When did you see those figures in there first?

A. In the first part of this year the second time; the first time in 1921 when we took over the company.

Q. They were there then?

A. Yes, sir.

Q. They are in different ink?

A. Yes, sir.

Q. It looks like fresh writing?

A. I would not say that.

Q. It is not faded like the other figures?

A. It is all like that in the October entries.

Q. The words "cost of property" have been slanted up under the original entry of organization expense?

A. No, sir.

Q. On page 167 of this ledger you see an item of 1913 Oct. 31st General Journal 351 \$10,000.00; do you know what that is and when it was put in there?

A. Yes, sir.

Q. It is the same ink as on page 217 that you read a while ago?

A. Yes, sir.

Q. That General Journal, have you got it with you?

A. I have not, but I can bring it up.

Q. You say the Massillon Gas & Electric Co. built a high tension line from Massillon to Orrville?

A. Yes, sir.

Q. Why didn't they come direct to Orrville instead of coming along the Lincoln Highway south of Orrville?

A. I don't know.

Q. Wasn't it a fact that the plans of this company were to extend their lines west, taking in all the towns along [fol. 126] the Lincoln Highway west, do you know anything about that?

A. No.

Q. Since then they have continued west, The Ohio Public Service Company is serving electricity for towns west of Orrville now? Smithville and Apple Creek?

A. No.

Q. Don't Apple Creek get its power from there?

A. No.

Q. It is contemplated that they are going further west than they are now with their high tension lines?

A. Not to my knowledge.

Q. You say you made no entries on this book?

A. No, sir.

Q. What you know about this book is what you see on these pages?

A. And supporting vouchers and checks and various other supporting papers.

Q. That expense in building the line from Massillon to Orrville, did it take in any other expense than what you have stated?

A. The ordinary supplies of building the line, hardware, etc.

Q. Supervision by officers?

A. A foreman and superintendent in building the line.

Q. If you were not allowed to distribute electricity in Orrville, this line built from Massillon to Orrville would not be a loss to your company, would it?

A. I would not say it would be a loss today.

Q. Do you know how far it is from Massillon to Orrville Junction?

A. About fifteen miles.

Q. How far from Orrville Junction to the Village of Orrville?

A. I would not like to state.

[fol. 127] Q. The character of the line from Orrville Junction to Orrville is different from the line from Massillon?

A. I don't know.

And, further, the respondent, to maintain the issues on its part, called the witness LEROY STROBEL, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. Leroy Strobel.

Q. What position do you occupy with The Ohio Public Service Co.?

A. General Line foreman.

Q. How long have you been so employed?

A. I have been with the company 24 years.

Q. Did you have anything to do with the construction of the line from Massillon to Orrville?

A. Yes, sir.

Q. For what purpose was that high tension line constructed?

A. To furnish current to Orrville.

Q. State whether or not that line was constructed over a direct route from Massillon to Orrville?

A. Yes, sir.

Q. Is any portion of that line along the Lincoln Highway?

—. No, sir.

[fol. 128] Cross-examination.

By L. R. Critchfield:

Q. It don't go far as far south as the Lincoln Highway?

A. No, sir.

Q. It does not run directly into Orrville from Massillon?

A. It is a direct route, yes, sir.

Q. You are three-fourths of a mile south of Orrville?

A. Yes, sir.

Q. Then it goes west?

A. No, sir.

Q. Where does it go to?

A. It goes to Orrville.

Q. Don't it go west?

A. No, sir.

Q. Between Massillon and Orrville lie the towns of West Brookfield, East Greenville, Greenville and Dalton?

A. Yes, sir.

Q. And Bowdil, formerly North Lawrence?

A. Yes, sir.

Q. Does this line furnish electricity to those towns?

A. No, sir.

Q. None of them?

A. No, sir.

Q. Don't they all have branches off from this line?

A. No, sir.

Q. Where does Dalton get its light?

A. Off this line, but the others don't.

Q. When this line was built wasn't it contemplated to take on Dalton?

A. No, sir.

Q. When was Dalton taken on?

A. About a year later.

Q. Since then your company is furnishing electricity to various towns west of Orrville, is it not?

A. To Wooster.

[fol. 129] Q. And it lights up Apple Creek?

A. Don't know anything about that.

Q. It is the current that lights up Fredericksburg and Shreve?

A. The only thing that we furnish west of Orrville is to Wooster; what they do with it I don't know.

Q. The Wooster Electric Company acts as distributor to these towns, but the electric current all comes from your company?

A. No.

Q. Apple Creek, Smithville, Wooster, Fredericksburg, Shreve, all towns west of Orrville the current comes from Massillon through your company?

A. I don't know.

Redirect examination.

By Henkel:

Q. You may state whether or not you have recently made an investigation and if so what that investigation shows as to the use of any of the property of The Ohio Service Co. poles, especially in the Village of Orrville by the Village?

A. We made an inspection along about the 20th of April.

Q. What did you find?

A. That they had some contacts on some of our poles.

Q. Can you give the number?

A. About eighteen.

Recross-examination.

By Critchfield:

Q. That is, the Orrville municipal plant had their wires on your poles?

A. Yes, sir.

[fol. 130] Q. That was due to the fact that you had a pole setting right where they would have placed a pole, your pole not being in use, they tacked an insulator on and strung the wire on?

Objected to; overruled; exceptions.

A. They tacked a bracket on and fastened their wire to it.

Q. It was because your pole was in the road?

A. No, sir, I do not think so.

Q. Did you look to see how many telephone poles your wires were tacked on to?

A. We pay for them.

Q. Did you see how many there were?

A. Not all of them.

Q. How many did you see?

A. I don't know.

Q. You saw a good many?

A. Quite a few.

Q. You pay for the privilege of tacking on?

A. Yes, sir.

Q. If you took your wires off, your obligation to pay would cease?

A. Most assuredly.

By Henkel: If the court please, we have a statement here, counsel don't agree, and we would like to have the record show, and the court can pass upon its competency as to tax valuation of the property of the Massillon Electric & Gas Company in the County of Wayne from 1915 to 1923, inclusive.

Objected to.

By Henkel: We have some municipal records that we wish to introduce and with that we rest.

[fol. 131] Objected to.

Volume 1 of the Ordinance Record, Pages 32 to 36, inclusive.

Volume 2 of the Council Records, Pages 170 to 173, inclusive.

Volume 1 of the Ordinance Records, Page 42.

Volume 2 of the Council Records, Page 192, starting on Page 191.

Volume 1 of the Ordinance Records, Pages 225 to 229, inclusive.

Volume 3 of the Council Records, Page 318.

Volume 3 of the Ordinance Records, Pages 122 to 126, inclusive.

Volume 4 of the Council Records, Page 245.

Volume 4 of the Ordinance Records, Pages 273 to 276, inclusive.

Volume 5 of the Council Records, Page 276.

Volume 6 of the Council Records, Pages 238 and 242.

Volume 5 of the Ordinance Records, pages 136 and 137; 150 to 153, inclusive. Page 166.

Volume 7 of the Council Records, Pages 18, 20, 21, and Pages 32 and 33, inclusive.

Realtor objects to the introduction of these records as incompetent and immaterial.

By Henkel, to Critchfield: Do you admit that the records that have been referred to by volume and page are either the Ordinance Records or the records of the Council proceedings of the Village of Orrville, Ohio?

[fol. 132] Critchfield: Yes, sir.

By Henkel: Your objection to the introduction of these records does not go to the record itself or the authenticity

thereof, but the question simply of the competency or relevancy of what may appear therein?

Critchfield: That is all.

Objection overruled; exceptions.

Critchfield: The Relator wants to object to any record that is incompetent or irrelevant.

By Henkel: After Mr. Wagner left the witness stand, Judge Pardee inquired of him if his statement was that his company sold all of its assets of every kind and the amount of money received therefor was proportionately distributed among the stockholders; is that true? Mr. Wagner's answer was in the affirmative. Is that right, Judge Pardee?

Judge Pardee: Yes, sir.

By Henkel: Yesterday we made some objections and without desiring to interrupt the court's hearing of the testimony, I don't know that we saved any exceptions, and I would like and I know the court would be willing to give exceptions to any objections that were overruled.

[fol. 133] Court: Granted by the court to either side.

(Here follow some agreements which are contained in the agreed statement of facts.)

Respondent rests.

Relator rests.

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[fol. 134] Return to writ of error omitted in printing.

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[fol. 135] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—  
Filed December 7, 1925

To the Honorable Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio:

You petitioner, The Ohio Public Service Company, a corporation, created, organized and existing under the laws of the State of Ohio, respectfully says that on or about the

2nd day of June, A. D. 1925, the Supreme Court of Ohio made and entered a final order and judgment herein in favor of the State of Ohio ex rel. Joseph O. Fritz, Prosecuting Attorney of Wayne County, Ohio, and against your petitioner. Thereupon the petitioner, The Ohio Public Service Company, as provided by law, filed its application for a re-hearing and said court subsequently and on the 10th day of October, 1925, denied said application for re-hearing; the judgment of the Supreme Court of Ohio in this matter thereupon became final, said Court having fully exercised its jurisdiction in said cause. In which final order and judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of your petitioner, all of which will more in detail appear by the record of the proceedings in said cause, and from the assignment of errors which is filed with this petition.

That said Supreme Court of the State of Ohio is the highest court of the said State of Ohio in which a decision [fol. 136] in this suit and in this matter could be had.

That this suit or cause was one in which the State of Ohio ex rel. Joseph O. Fritz, Prosecuting Attorney of Wayne County, Ohio sought to oust your petitioner from its franchises, grants and rights in the use and enjoyment of the public streets, lanes, alleys, avenues, parks and public places of the Village of Orrville, being a municipal corporation of the State of Ohio located in Wayne County, State of Ohio, for the erection and maintenance of poles, wires, guy wires and electrical equipment for the purpose of supplying private individuals, firms and corporations of said Village of Orrville with electricity for commercial and private lighting purposes.

That in said suit or cause your petitioner for answer therein alleged that it was a corporation organized under the laws of the State of Ohio, and was duly authorized and empowered to generate, transmit and distribute electricity in various communities in the State of Ohio, including said Village of Orrville; that at the time of the filing of the petition it owned and was using and exercising certain franchises, rights and privileges for the distribution of electricity in said Village of Orrville, granted to it and to its predecessors in title by the State of Ohio, under a certain law of said State passed by the General Assembly

thereof on the 26th day of January 1887, (84 O. L. 7) and entitled "An Act to Supplement Sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio"; and also that it was duly authorized and empowered to generate, transmit and distribute electricity in the Village of Orrville by reason of a certain franchise passed by the Council of the Village of Orrville, Ohio, on February 1, 1892. Section I of said Ordinance provided as follows:

[fol. 137] "Section 1. That Aurel P. Gans and Melville D. Wilson of Canal Dover, Ohio, their associates, successors and assigns, are hereby authorized and empowered to use the streets, lanes, alleys and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power."

That your petitioner and its predecessors were authorized to use and enjoy all the rights granted under and by virtue of said franchise; and after the passage of said Ordinance on February 1, 1892, the Council of said Village did subsequently recognize the right of your petitioner and its predecessors under said franchise and to operate thereunder in furnishing electricity to said Village and the inhabitants thereof and in the use of the streets, lanes, avenues and public places of said Village. That said franchises, grants and rights had been used and enjoyed by your petitioner and its predecessors in title for a period of thirty years for the furnishing of electricity to said Village and the inhabitants thereof; that your petitioner and its predecessors had expended large sums of money in the construction of electrical equipment in the said Village for furnishing of such service; that the mode and manner of the use of the streets, alleys, lanes, squares and public places in said Village by the equipment necessary for said service was agreed and consented to by the authorities of said Village; that said franchises, grants and rights to generate and distribute electricity in said Village of Orrville were perpetual in duration; that they were not terminable or revocable, nor subject to annulment at the will of said state nor of said village, and in particular that the ordinance and resolution of the village of Orrville, Ohio, passed by its Council on or about the 18th day of June,

1923, which undertook to terminate and annul said franchises, grants and rights of your petitioner were without warrant or authority in law, and in violation of and repugnant to the Constitution of the United States of Amer-  
[fol. 138] ica, and especially of Section 10 of Article I thereof, and Section 1 of the 14th Amendment thereof.

That the said Supreme Court of the State of Ohio in said final order and judgment adjudged and decided that said franchises grants and rights to distribute electricity in said Village of Orrville, Ohio, as aforesaid, were revoked and annulled by said ordinance and resolution of the said Village of Orrville under authority of certain act passed by the General Assembly of the State of Ohio on April 21, 1896, entitled "An Act to Amend Section 3471-a of the Revised Statutes of Ohio," (92 O. L. 206); and further, that said Act of April 21, 1896, of itself and without action by the Council of said Village, revoked and annulled said franchises, grants and rights of your petitioner in said Village, and it was adjudged by said Supreme Court by its said final order and judgment herein that said ordinance and resolution of June 18, 1923, of the Village of Orrville and said Act of April 21, 1896, of the General Assembly of the State of Ohio, as interpreted by said Court, were not in violation of nor repugnant to the provisions of Section 10 of Article I of the Constitution of the United States of America, nor of Section 1 of the 14th Amendment thereof.

That the interpretation and construction put upon said Act of April 21, 1896, by the Supreme Court of Ohio, in holding and deciding herein that the franchises, grants and rights of your petitioner were revoked and annulled by said Act and the authority delegated therein, is in conflict with and contrary to the previous interpretation and construction of said Act by said Supreme Court of the State of Ohio in the case of the Hardin-Wyandot Lighting Company vs. The Village of Upper Sandusky, (93 O. S. 428), as affirmed by the Supreme Court of the United States (251 U. S. 173). That your petitioner, relying upon said former interpretation and construction of said Act of April 21, 1896, did, after the decision in the said Hardin-Wyandot case, on or about the 29th day of October, 1921, purchase  
[fol. 139] the said electrical plant in the Village of Orrville, and said franchises, grants and right to distribute electric-

ity therein. That said present interpretation of said Act by the Supreme Court of the State of Ohio is in violation of and repugnant to the Constitution of the United States of America, and especially of Section 10 of Article I thereof, and Section 1 of the 14th Amendment thereof.

That on the 29th day of June, 1925, your Petitioner filed its application for rehearing in this cause in the supreme Court of Ohio on the grounds set forth in said application which is a part of the record herein; and that on the 10th day of October 1925, said Court denied said application and thereupon said judgment became final; and thereafter said Supreme Court of Ohio handed down a revised opinion materially modifying the grounds upon which the final judgment was based.

That said Supreme Court of Ohio, in said final order and judgment adjudged and decided that said franchises, grants and rights to distribute electricity in said Village of Orrville, Ohio as aforesaid, were revoked and annul-ed by said ordinance and resolution of the said Village of Orrville, Ohio, under authority of a certain act, passed by the General Assembly of the State of Ohio, on April 21, 1896, entitled "An Act to Amend Section 3471-a of the Revised Statutes of Ohio", (92 O. L. 206); and it was adjudged by said Supreme Court by said final order and judgment herein that said ordinance and resolution of June 18, 1923, of the Village of Orrville, under said Act of 1896, as interpreted by said Court were not in violation of or repugnant to Section 10 of Article I of the Constitution of the United States of America, nor of Section 1 of the 14th Amendment thereof.

That the Supreme Court of Ohio, in said final order and judgment adjudged and decided that said franchises, [fol. 140] grants and rights to distribute electricity in said Village of Orrville, Ohio, as aforesaid, were revoked and annul-ed by said ordinance and resolution of said Village of Orrville, Ohio, under authority of a certain Act, passed by the General Assembly of the State of Ohio, on the 12th day of May 1886, entitled "An Act to authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets and also public places with electricity" (83 O. L. 143); and it was adjudged and decided by said Su-

preme Court by its final order and judgment herein that said ordinance and resolution of June 18, 1923 of the Village of Orrville, Ohio, were not in violation of, nor repugnant to the provisions of Section 10 of Article I of the Constitution of the United States of America, nor of Section 1 of the 14th Amendment thereof.

That the said Supreme Court of the State of Ohio in said final order and judgment adjudged and decided that a certain act, passed by the General Assembly of the State of Ohio on April 21, 1896, entitled, "An Act to Amend Section 3471-a of the Revised Statutes of Ohio" (92 O. L. 206) made said franchises, grants and rights to distribute electricity in said Village of Orrville, Ohio, as aforesaid, non-assignable without the consent of the said Village of Orrville, Ohio; and that the sales, assignments and transfers of said franchises, rights and grants by The Orrville Light, Heat and Power Company and the other predecessors in title of this petitioner, to distribute electricity in said Village of Orrville, Ohio, as aforesaid, were null and void for the reason that the said Village of Orrville had not consented thereto; and it was adjudged and decreed by said Supreme Court, by its said final order and judgment herein that the said Act of April 21, 1896 of the General Assembly of the State of Ohio, as interpreted by said Court, was not in violation of, nor repugnant to the provisions of Section 10 of Article I of the Constitution of the United States of [fol. 141] America, nor of Section 1 of the 14th Amendment thereof.

That the interpretation and construction upon said Act of April 21, 1896, by the Supreme Court of Ohio in holding and deciding herein that the franchises, grants and rights of your petitioner and its predecessors in title were not assignable by said Act without the consent of the Village of Orrville and that the interpretation and construction put upon the Act of May 12, 1886 holding and deciding therein that said franchises, grants and rights of The Orrville Light, Heat and Power Company, and the other predecessors in title of your petitioner, could not be assigned without the consent of the Village of Orrville, Ohio, are in conflict with and contrary to the previous interpretation and construction of said Acts by said Supreme Court of the State of Ohio in the case of The Hardin-Wyandot Lighting

Company v. The Village of Upper Sandusky, (93 O. S. 428), as affirmed by the Supreme Court of the United States (251 U. S. 173). That your petitioner, relying upon said former interpretation and construction of said Acts, did after the decision in the said Hardin-Wyandot case, on or about the 29th day October, 1921, purchase the said Electrical Plant in the Village of Orrville, Ohio, and said franchises, grants and rights to distribute electricity therein. That said present interpretation of said Acts by the Supreme Court of the State of Ohio is in violation of and repugnant to the Constitution of the United States of America, and especially to Section 10 of Article I thereof, and Section I of the 14th Amendment thereof.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in its behalf to the Supreme Court of Ohio to the end that the record in said matter may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected, and [fol. 142] said judgment reversed, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Dated this 7th day of December, 1925.

Franklin L. Maier, C. H. Henkel, Attorneys for the Ohio Public Service Company, Petitioner. Of Counsel: Squier, Sander & Dempsey, Frank M. Cobb.

[fol. 143] The writ of error as prayed for in the foregoing petition is hereby allowed this 7th day of December, 1925, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of Ten Thousand Dollars (\$10,000.00).

Dated at the City of Columbus, Ohio, this 7<sup>th</sup> day of December, A. D. 1925.

Carrington T. Marshall, Chief Justice of Supreme Court of the State of Ohio.

[fol. 143a] [File endorsement omitted.]

[fol. 144]

## IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENTS OF ERROR—Filed December 7, 1925

Now comes the petitioner, in connection with the petition for writ of error herein, and respectfully submits that in the record, proceedings, decision, final order and judgment of the Supreme Court of the State of Ohio in the above entitled action there is manifest error in this, to-wit:

1. The Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Wayne County, Ohio, and in refusing to reverse said judgment and remand this cause to said Court for further proceedings.

2. The judgment of the Supreme Court of the State of Ohio in this cause is in violation of and repugnant to Section 10 of Article I of the Constitution of the United States of America, which prohibits any state from passing any law impairing the obligation of contracts.

3. The judgment of the Supreme Court of the State of Ohio in this cause is in violation of and repugnant to Section I of the 14th Amendment to the Constitution of the United States which declares that no state shall deprive any person of property without due process of law.

[fol. 145] 4. The Supreme Court of Ohio erred in holding that the franchises, grants and rights of your petitioner and its predecessors in title acquired from the State of Ohio under an Act of the Legislature of the State of Ohio passed on the 26th day of January 1887, entitled "An Act to Supplement Sections 3454 to 3471, inclusive, of the Revised Statutes of Ohio" (84 O. L. 7) were revoked, annulled and canceled by the Act of the Legislature of said state passed on the 21st day of April, 1896, entitled "An Act to Amend Section 3471-a of the Revised Statutes of Ohio" (92 O. L. 206), in violation of and in conflict with the inhibitions of Section 10 of Article I of the Constitution of the United States with respect to the impairment of contract rights and of Section 1 of Article XIV of the Amendments thereto in regard to depriving any person of his property without due process of law.

5. The Supreme Court of the State of Ohio erred in holding that the franchises, grants and rights of your petitioner and predecessors in title to distribute electricity in said Village of Orrville, Ohio, were revoked, annulled and canceled by the ordinance and resolution of said Village of Orrville, passed by the Council thereof on the 18th day of June, 1923, under the authority of the provisions of said Act of April 21, 1896,—contrary to and in violation of the provisions of Section 10, Article I of the Constitution of the United States and of Section 1 of Article XIV of the amendments thereto.

6. The Supreme Court of Ohio erred in holding that the franchise, grant and right of your petitioner acquired from the State of Ohio under said Act of the Legislature of said State passed January 26, 1887, above referred to, and the amendments thereto, was revoked, annulled and canceled by the Act of the Legislature of said State passed on the 21st day of April 1896, and above referred to, and also in holding that said Act of April 21, 1896, conferred upon the Council of the Village of Orrville authority to [fol. 146] cancel and annul said franchise, grant and right of your petitioner by the passage of the resolution and ordinance of June 18, 1923, all in violation of and in conflict with the inhibitions of Section 10 of Article I of the Constitution of the United States, and of Section 1 of Article 14 of the Amendments thereto.

7. The Supreme Court of Ohio erred in holding that the franchise, grants and rights of your petitioner and its predecessors in title, acquired from the Village of Orrville, Ohio, under an ordinance passed by the Council of said Village on February 1, 1892, entitled "An ordinance providing for electric lights, heat and motive power in the Village of Orrville, Wayne County, Ohio" were revoked, annulled and canceled by the ordinance and resolution of said Village of Orrville, Ohio, passed by the council thereof on the 18th day of June, 1923, contrary to and in violation of the provisions of Section 10, Article I of the Constitution of the United States, and of Section 1 of Article Fourteen of the amendments thereto.

8. The Supreme Court of the State of Ohio erred in giving effect to Legislative enactments of the State of

Ohio and of said Village of Orrville, Ohio, which impair the obligation of the contract rights of your petitioner, contrary to the inhibitions, of Section 10, Article I of the Constitution of the United States, and which deprive your petitioner of its property without due process of law, contrary to the inhibitions of Section 1 of Article XIV of the amendments thereto.

9. The Supreme Court of the State of Ohio erred in rendering said final judgment in that it impaired the obligation of the contract made between the State of Ohio and The Orrville Light, Heat, Power Company, the predecessor in title of your petitioner, under and pursuant to said Act of January 26, 1887, granting to said Company the franchise and right to use the public streets of the Village of Orrville for the transaction of the business for which it was incorporated to furnish electric light, heat and power to said Village and its inhabitants, and the consent and agreement by the authorities of the Village of Orrville, Ohio, as expressed in the ordinance of February 1, 1892, relative to the mode and manner of the use of streets, alleys, lanes, squares and public places in said Village by the equipment necessary for said service, which contract, grant, franchise and right was acquired for a valuable consideration by your petitioner in 1921, and is now owned by your petitioner—contrary to and in violation of the provisions of Section 10 of Article I of the Constitution of the United States, and of Section 1 of Article XIV of the amendments thereto.

10. The Supreme Court of the State of Ohio erred in interpreting said Act of April 21, 1896, as revoking and annulling the grants, franchises and rights granted by the State to your petitioner, and to the Orrville, Light, Heat and Power Company, under the provisions of the Act of said Legislature passed January 26, 1887, such interpretation being in conflict with and contrary to a previous interpretation of said Act by the said Supreme Court of the State of Ohio in the case pending therein entitled "The Hardin-Wyandot Lighting Company vs. The Village of Upper Sandusky" (93 O. S. 428), decided February 15, 1916, by said Court, and which decision was affirmed by the Supreme Court of the United States on December 15,

1919 (251 U. S. 173) in that your petitioner, relying upon said former interpretation and its affirmance by the Supreme Court of the United States, did on or about the 29th day of October 1921, purchase said electrical plant in the Village of Orrville and said franchise, grant and right of said The Orrville Light, Heat & Power Company; contrary to and in violation of the provisions of Section 10 of Article I of the Constitution of the United States, and of [fol. 148] Section 1 of Article XIV of Amendments thereof.

11. The Supreme Court of the State of Ohio erred in interpreting said Act of April 21, 1896, as giving authority to the Village of Orrville to cancel, revoke and annul by the passage of said resolution and said ordinance by its Council on June 18, 1923, the contract rights and franchises of your petitioner and of its predecessor in title, The Orrville Light, Heat & Power Company, granted by the State of Ohio under the Act of January 26, 1887, such interpretation being contrary to and in conflict with a former decision of said Supreme Court of Ohio in the case of The Hardin-Wyandot Lighting Company vs. Village of Upper Sandusky (93 O. S. 428), decided February 15, 1916, and the affirmance thereof by the Supreme Court of the United States on December 15, 1919, (251 U. S. 173) in that your petitioner, relying upon said former interpretation and its affirmance by the Supreme Court of the United States, did on or about the 29th day of October, 1921, purchase said electrical plant in the Village of Orrville and said franchise, grants and right of said The Orrville, Light, Heat & Power Company; contrary to and in violation of the provisions of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the amendments thereof.

12. The Supreme Court of the State of Ohio erred in refusing to hold and decide that the Act of the Legislature of said State passed on the 21st day of April, 1896, entitled "An Act to Amend Section 3471-a of the Revised Statutes of Ohio," impaired the obligations of the contract, namely the franchises, grant and right of your petitioner acquired from the State of Ohio under Act of the Legislature of said State passed January 26, 1887, and was and is in violation of and in conflict with Section 10 of Article I of the Constitu-

tution of the United States, and of Section 1 of Article XIV of the Amendments thereto.

[fol. 149] 13. The Supreme Court of the State of Ohio erred in refusing to hold and decide that the ordinance and resolution of said Village of Orrville passed by the Council thereof on the 18th day of June, 1923, impaired the obligations of the contract, namely, the franchises, grant and right of your petitioner acquired from the State of Ohio under Act of the Legislature of said State passed January 26, 1887, and was and is in violation of and in conflict with Section 10 of Article I of the Constitution of the United States and of Section 1 of Article XIV of the Amendments thereto.

14. The Supreme Court of the State of Ohio erred in refusing to hold and decide that the ordinance and resolution of said Village of Orrville, passed by the Council thereof on the 18th day of June, 1923, impaired the obligations of the contract, namely, the franchises, grant and right to your petitioner and its predecessors in title acquired from the Village of Orrville, Ohio, under the ordinance passed by the Council of said Village on February 1, 1892, and was and is in violation of and in conflict with Section 10 of Article I of the Constitution of the United States and of Section 1 of Article XIV of the Amendments thereto.

15. That the Supreme Court of Ohio, in said final order and judgment adjudged and decided that said franchises, grants and rights to distribute electricity in said Village of Orrville, Ohio, as aforesaid, were revoked and annulled by said ordinance and resolution of said Village of Orrville, Ohio, under authority of a certain Act, passed by the General Assembly of the State of Ohio on the 12th day of May, 1886, entitled "An Act to authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets, and other public places with electricity" (83 O. L. 143); and it was adjudged and decided by said Supreme [fol. 150] Court by its final order and judgment herein that said ordinance and resolution of June 18, 1923, of the Village of Orrville, Ohio, was not in violation of, nor repugnant to the provisions of Section 10 of Article I of the Constitu-

tion of the United States of America, nor of Section 1 of the 14th Amendment thereof.

16. That the said Supreme Court of the State of Ohio in said order and judgment adjudged and decided that a certain Act, passed by the General Assembly of the State of Ohio, on April 21, 1896, entitled "An Act to Amend Section 3471-a of the Revised Statutes of Ohio" (92 O. L. 206) made said franchises, grants and rights to distribute electricity in said Village of Orrville, Ohio, as aforesaid, non-assignable without the consent of the said Village of Orrville, Ohio; and that the sales, assignments and transfers of said franchises, rights and grants by The Orrville, Light, Heat & Power Company and the other predecessors in title of this petitioner, to distribute electricity in said Village of Orrville, Ohio, as aforesaid, were null and void for the reason that the said Village of Orrville had not consented thereto; and it was adjudged and decreed by said Supreme Court by its said final order and judgment herein that the said Act of April 21, 1896 of the General Assembly of the State of Ohio, as interpreted by said Court, was not in violation of, nor repugnant to the provisions of Section 10 of Article I of the Constitution of the United States of America, nor of Section 1 of the 14th Amendment, thereof.

17. That the interpretation and construction upon said Act of April 21, 1896 by the Supreme Court of Ohio in holding and deciding herein that the franchises, grants and rights of your petitioner and its predecessors in title were not assignable by said Act without the consent of the Village [fol. 151] of Orrville and that the interpretation and construction put upon the Act of May 12, 1886, holding and deciding therein that said franchises, grants and rights of The Orrville Light, Heat and Power Company and the other predecessors in title of your petitioner, could not be assigned without the consent of the Village of Orrville, Ohio, are in conflict and contrary to the previous interpretation and construction of said Acts by said Supreme Court of the State of Ohio in the case of The Hardin Wyandot Lighting Company v. The Village of Upper Sandusky (93 O. S. 428), as affirmed by the Supreme Court of the United States (251 U. S. 173). That your petitioner, relying upon said former interpretation and construction

of said Acts, did after the decision in the said Hardin-Wyandot case, on or about the 29th day of October 1921, purchase the said electrical plant in the Village of Orrville, Ohio, and said franchises, grants and rights to distribute electricity therein. That said present interpretation of said Acts by the Supreme Court of the State of Ohio is in violation of and repugnant to the Constitution of the United States of America, and especially to Section 10 of Article I thereof, and Section I of the 14th Amendment thereof.

Franklin L. Maier, C. H. Henkel, Attorneys for Petitioner. Of Counsel: Squire, Sanders & Dempsey, Frank M. Cobb.

[fol. 151a] [File endorsement omitted.]

—  
[fol. 152] IN SUPREME COURT OF OHIO

[Title omitted]

WREIT OF ERROR—FILED December 7, 1925

THE UNITED STATES OF AMERICA, SS:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio,  
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Ohio, before you or some of you, being the highest court of law or equity of said state in which decision could be had in the said suit between The Ohio Public Service Company and the State of Ohio ex rel. Joseph O. Fritz, Prosecuting Attorney of Wayne County, Ohio, wherein was drawn in question the validity of a statute of said state on the ground of its being repugnant to the provisions of the Constitution of the United States and the amendments thereto, and said decision was in favor of such, its validity, and said decision of the Supreme Court of Ohio gave a construction relative to such statute at variance with the former decisions of the Supreme Court of the United States of America; and said decision of the Supreme Court of the State of Ohio

was against the title, right, privilege and immunity claimed [fol. 153] under the Constitution of the United States and the amendments thereto; and by reason of said decision a manifest error hath happened, to the great damage of the said The Ohio Public Service Company as by its complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 6th day of January, 1926, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States the 7th day of December, in the year of our Lord 1925.

Harry F. Rabe, Clerk of the United States District Court for the Southern District of Ohio, Eastern Division, by C. P. White, Jr., Deputy. (Seal of United States Circuit Court Southern District of Ohio.)

Allowed by Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 153a] [File endorsement omitted.]

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[fol. 154-155a] Citation, in usual form, showing service on L. R. Critchfield et al., filed December 10, 1925, omitted in printing.

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[fol. 156-158a] Bond on writ of error for 10,000, approved and filed December 9, 1925, omitted in printing.

[fol. 159]

## IN SUPREME COURT OF OHIO

[Title omitted]

## MOTION AND ORDER EXTENDING TIME

Application is hereby made for extension of time of ten days within which return may be made to the writ of error allowed in this cause for the reason the undersigned is unable to prepare the transcript as called for the *præcipe* of plaintiff-in-error filed this day within the time required by the writ of error.

Seba H. Miller, Clerk of the Supreme Court of Ohio.

*Duly sworn to by Seba H. Miller. Jurat omitted in printing.*

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[fol. 160]

[Title omitted]

Upon application of Seba H. Miller, Clerk of this Court, and for good cause shown, it is hereby ordered that the time within which said Clerk may make return to the writ of error allowed in this cause on December 7th 1925, be extended until January 16th 1926, and it is further ordered that the time for filing of said transcript of record with the Clerk of the Supreme Court of the United States be also extended until January 16th, 1926.

C. T. Marshall, Chief Justice.

Dated at Columbus, Ohio, January 4th, 1926.

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[fol. 161]

## IN SUPREME COURT OF OHIO

[Title omitted]

PRÆCIPÉ FOR TRANSCRIPT OF RECORD—Filed January 4, 1926

To the Clerk:

You are hereby directed to prepare a transcript of, certify and transmit to the Clerk of the Supreme Court of the United States of America the entire record in this

cause, together with all pleadings and papers filed in this Court excepting the following: Exhibit A, C, D, G, N, O, P, Q, R, X and Z, and Relator's Exhibit One (1).

Franklin L. Maier, C. H. Henkel, Attorneys for Plaintiff in Error. Of Counsel: Frank M. Cobb, Squire, Sanders & Dempey.

Service of the foregoing by copy acknowledged this 31st day of December, A. D. 1925, at Wooster, Ohio.

J. O. Fritz, A. H. Etling, and L. K. Critchfield, Attorneys for Defendant in Error.

[fol. 161a] [File endorsement omitted.]

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[fol. 162]      IN SUPREME COURT OF OHIO  
DOCKET AND JOURNAL ENTRIES

[Title omitted]

Transcript of Docket Entries, Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders, and Decrees

1924.

Sept. 25. Petition in error (as of right), transcript of docket and journal entries, original papers, and pro-eipe for summons filed.  
 " 25. Summons issued for defendants to sheriff of Wayne County returnable October 6, 1924. Sent by registered mail P. O. Receipt No. 75872.  
 " 30. Court of Appeals original papers, bill of exceptions and exhibits filed.  
 " 30. Papers sent to H. J. Chittenden Co. by express.  
 Oct. 2. Motion by plaintiff to dispense with printing of exhibits and acknowledgment filed.  
 " 4. Summons returned and filed endorsed: "Sheriff's Return: State of Ohio, Wayne County, Received this writ September 26, 1924 at 10 o'clock A. M. and on September 29, 1924 I

served the within named Joseph O. Fritz, Prosecuting Attorney and on October 2, 1924, I served L. R. Critchfield, Attorney and A. H. Etling, Attorney by personally handing to each of them a true and certified copy thereof with all the endorsements thereon. Fees, \$1.53, Andrew W. Bucher, Sheriff.

Oct. 14. Motion by plaintiff to dispense with printing exhibits allowed. Journal 30, Page 101.  
 " 22. Papers returned by H. J. Chittenden Co.  
 " 22. Printed record and affidavit as to service filed.  
 " 27. Plaintiff's printed briefs filed. 10/29/24, Proof of service filed.  
 Nov. 24. Printed brief of defendant and proof of service filed.  
 Dec. 13. Order extending time for filing printed reply brief of plaintiff to December 29, 1924. Journal 30, Page 153.  
 " 29. Reply brief of plaintiff and proof of service filed.

[fol. 163]

1925.

Jun. 2. Judgment Affirmed. Journal 30, Page 283.  
 " 9. Original papers and bill of exceptions sent to Clerk.  
 " 17. Mandate issued.  
 " 29. Application for rehearing by plaintiff in error filed.  
 Jul. 27. Petition for Writ of Error from U. S. Supreme Court to Supreme Court of Ohio, allowed by Marshall, C. J., filed.  
 " 27. Assignment of Errors filed.  
 " 27. Citation for defendant issued to Sheriff of Wayne County.  
 " 27. Pre-ecipe for record filed.  
 " 27. Writ of Error filed and two copies lodged for Clerk and defendant.  
 " 27. Bond for \$10,000, signed by plaintiff in error as principal and by the American Surety Co. of N. Y. as surety, filed and approved by the Chief Justice.  
 " 27. Duplicate copy of bond filed.

Jul. 30. Citation and returns of service on defendant filed.

Aug. 7. Pr-eceipe of plaintiff in error as to transcript (to replace pr-eceipe heretofore filed) filed.

" 11. Original papers, bill of exceptions and exhibits received from Clerk of Courts of Wayne County.

" 20. Certified Transcript of record (as per pr-eceipes) and all papers re Writ of Error, sent Clerk U. S. Supreme Court, Washington, D. C., by registered mail, P. O. Receipt No. 8858.

Oct. 10. Rehearing denied. Journal 30, Page 348.

Nov. 10. Petition for writ of error from U. S. Supreme Court to Supreme Court of Ohio allowed by Marshall, C. J.

" 10. Assignment of errors filed.

" 10. Writ of Error filed and two copies lodged for Clerk and defendant.

" 10. Citation issued for defendant to Sheriff of Lorain County. Registry No. 24164.

" 20. Citation returned and filed, endorsement showing service on L. R. Critchfield and A. H. Etting, Attorneys of record for defendant in error; all served personally; signed Andrew W. Bueher; Sheriff's Fees, \$1.66.

Dec. 2. Bond for \$10,000, signed by plaintiff in error and by American Surety Company of New York as surety, filed and approved by Chief Justice.

" 2. Duplicate copy of bond filed.

" 5. Pr-eceipe of plaintiff in error as to transcript of record filed.

" 5. Application by Clerk of Supreme Court for extension of time fifteen days within which return may be made to writ of error filed.

" 7. Petition for writ of error from U. S. Supreme Court to Supreme Court of Ohio, allowed by Marshall, C. J., filed.

" 7. Assignment of errors filed.

" 7. Writ of Error filed and two copies lodged, one for Clerk and one for defendant.

" 7. Citation issued for defendant to Sheriff Wayne County, Ohio.

Dec. 9. Bond in sum of \$10,000, signed by plaintiff in error and by American Surety Co. of New York as surety, filed and approved by Chief Justice.

" 9. Duplicate copy of bond filed.

" 10. Citation and return of service on defendant filed. 1926.

Jan. 4. Praecept of plaintiff in error as to transcript of record.

" 4. Application by Clerk of Supreme Court for extension of time of ten days within which return may be made to writ of error filed.

" 4. Application for extension allowed to January 16, 1926. C. T. Marshall, Chief Justice.

[fol. 164] Transcript of Journal Entries

No. 18784

OHIO PUBLIC SERVICE CO.

vs.

STATE OF OHIO ex Rel. JOSEPH O. FRITZ, Prosecuting Attorney

October 14, 1924. It is ordered by the Court that this motion be, and the same hereby is, allowed. J. 30, P. 101.

December 13, 1924. It is hereby ordered that the time for filing printed brief of plaintiff in error be extended to December 29, 1924. J. 30, P. 153.

JOURNAL ENTRY OF JUDGMENT

June 2, 1925. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Wayne County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be and the same is hereby, affirmed; and it appearing to the Court

that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at \$—. Ordered, That a special mandate be sent to the Common Pleas Court of Wayne County, to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Wayne County "for entry." J. 30, P. 283.

**JOURNAL ENTRY OF ORDER DENYING REHEARING**

October 10, 1925. It is ordered by the Court that the application for rehearing in the above cause be, and the same hereby is, denied. J. 30, P. 348.

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[fol. 165]      IN SUPREME COURT OF OHIO

EXHIBIT IN EVIDENCE

IN THE COURT OF APPEALS OF WAYNE COUNTY, OHIO

THE STATE OF OHIO on Relation of JOSEPH O. FRITZ, Prosecuting Attorney of Wayne County, Ohio, Plaintiff,

vs.

THE OHIO PUBLIC SERVICE COMPANY, Defendant

Motion

Now comes the Relator and moves the Court, as follows:

First. To require the defendant to strike out of said answer, on page 2, second paragraph, the words, "without any protest or complaint made to the Public Utilities Commission of Ohio."

Second. To require the defendant to set out more fully and definitely in the second paragraph on page 3 of said answer what if any authority was granted to The Massillon Electric and Gas Company to acquire the property of the Orrville Light, Heat and Power Company thru D. I. Rennecker, as attempted to be set forth in said second paragraph, page 3, of said answer.

Third. To require the defendant to separately state and number its defenses in said answer.

Critchfield and Etling, Attorneys for Relator.

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[fol. 166] IN SUPREME COURT OF OHIO

EXHIBIT IN EVIDENCE

WAYNE COUNTY, OHIO, ss:

IN THE COURT OF APPEALS

THE STATE OF OHIO on Relation of JOSEPH O. FRITZ, Prosecuting Attorney, Wayne County, Ohio, Relator,

vs.

THE OHIO PUBLIC SERVICE COMPANY, Respondent

Motion

Now comes the Respondent and moves that the Court require the Relator to strike out of the Reply filed herein, the following portions thereof, this motion being directed to each and every part of the paragraph or portions of paragraphs hereinafter designated, both in whole and in part:

(1) Page 1, second paragraph, the words, "but denies that the organization of said corporation, or the authorization as set forth in said paragraph, gives to the Respondent any franchise rights as claimed by the Respondent, in said Village of Orrville"; for the reason that the same is immaterial, argumentative and constitutes a conclusion of law.

(2) Pages 1 and 2, third paragraph, beginning on page 1, the words, "but denies that any such service rendered by virtue of the power and authority granted by the State of Ohio gives to the Respondent any franchise rights in said Village of Orrville, Ohio"; for the reason that the same is immaterial, argumentative and constitutes a conclusion of law.

(3) Page 2, the second paragraph, the words, "but denies that by virtue of the facts stated in said 5th paragraph, the Respondent acquired any franchise rights in said [fol. 167] Village of Orrville, Ohio"; for the reason that the same is immaterial, argumentative and constitutes a conclusion of law.

(4) Page 2, third paragraph, the words, "and further says that if they did acquire such alleged rights as set forth in said 6th paragraph, that by virtue of said acquisition, said The Massillon Electric and Gas Company had no franchise rights in said Village to transfer to Respondent at the date of said alleged acquisition and respondent has now no franchise rights as claimed in said paragraph 6 by the Respondent, in the Village of Orrville, Ohio"; for the reason that the same is argumentative, immaterial and irrelevant.

(5) Pages 3, 4 and 5, the entire paragraph beginning on page 3 with the words, "and the Relator further says that if the Respondent claims", and ending on page 5 with the words, "except the mere sufferance of said Village of Orrville"; for the reason that the same is immaterial, irrelevant and argumentative.

(6) Page 6, first paragraph, the words, "and says that if said order was made by the Public Utilities Commission, as therein alleged, that said Public Utilities Commission had no power to make the same and the same was null and void"; for the reason that the same constitutes a legal conclusion.

(7) Page 8, the second paragraph, starting with the words, "The Relator in reply to paragraphs 14, 15, 16, 17 and 18 of said Answer", and ending with the words, "up to the present time"; for the reason that the same tenders no issue whatever and is improper, irrelevant and immaterial.

(8) Page 10, the last paragraph, all of pages 11 and 12 and the first paragraph on page 13, starting with the words, "The Relator further says in reply to the answer of the Respondent that" on page 10, and ending with the words, [fol. 168] "and forfeited all rights thereunder before and up to and at said July 15, 1917" on page 13; for the reason that the same is wholly immaterial and irrelevant.

(9) Page 13, second paragraph, and page 14, the first paragraph, beginning with the words, "Relator further says in reply to said Answer" on page 13, and ending with the words, "that of public lighting" on page 14; for the reason that the same is irrelevant and argumentative.

(10) Pages 14 and 15, that part thereof which begins with the words, "The Relator for further reply to the Answer of the Respondent says", and ending with the words, "and electrical equipment for any purpose since said date of June 19, 1923"; for the reason that the same constitutes a legal conclusion.

(11) Page 16 and the first paragraph on page 17, beginning with the words, "The Relator further says in Reply to said Answer of the Respondent" on page 16, and ending with the words, "by virtue of the facts above stated" on page 17; for the reason that the same is immaterial and redundant.

Franklin L. Maier, C. H. Henkel, Attorneys for Respondent.

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[fol. 169] IN SUPREME COURT OF OHIO

EXHIBIT "B" IN EVIDENCE

Massillon Electric and Gas Company  
to

Ohio Public Service Company

Deed #53385. \$3.00 Paid

Know all men by these presents: That the Massillon Electric and Gas Company, a corporation, by H. H. Ross, its president and C. L. Butler, its Secretary, hereunto duly

authorized and empowered, in consideration of ten dollars (\$10.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, and which was paid to it by The Ohio Public Service Company, does hereby grant, bargain, sell and convey to the said The Ohio Public Service Company, its successors and assigns, forever, the following described real estate, situated in the State of Ohio: parts of lots (now known as out lots) fifty one (51) and fifty two (52) in the City of Massillon, County of Stark, described as follows: Commencing at the northwest corner of the intersection of Sourt Erie and Walnut Streets; thence north along the eastern boundary of said lot which is also the west line of Erie Street to an iron stake twenty five feet from the north east corner of the building known as the Car Shop, said stake being also 49 feet south of the southeast corner of Russell and Co.'s engine paint shop; thence westerly parallel with the north line of said lot numbered fifty two (52) to the east line of the berme bank of the Ohio Canal; thence southerly along the east line of the berme bank of the Ohio Canal to the north line of Walnut Street; thence easterly along the north line of Walnut Street to the place of beginning. Said out lots being part of Fractional Section number seventeen (No. 17), Tp. No. 10, Range 9, (Perry Township), Stark County, Ohio, and being the same property conveyed by Russell and Company to the Massillon Light, Heat and Power Company by Warranty Deed signed and acknowledged February 11th, 1892, and recorded in Volume 285, page 493 of the deed records of said Stark County: Also, [fol. 170] part of a lot in the Township of Tuscarawas, County of Stark, described as follows: Being a part of the south east quarter of Section No. 1, Township 12, Range 10 and also part of the N. E. Quarter of Section 12 of the same township beginning at the N. W. Corner of the N. E. Quarter of said section 12, at a stone; thence north 5 degrees east one and 755/1000 chains to a pin in the center of the Wooster Road; thence south 85 $\frac{1}{2}$  degrees east, 16.615 chains to a point in the center of the Wooster Road and being the true point of beginning of the tract of land so to be conveyed to said company; thence south 4 $\frac{1}{2}$  degrees west, 65 feet thence north 85 $\frac{1}{2}$  degrees west 34 feet; thence north 4 $\frac{1}{2}$  degrees east 65 feet, thence south 85 $\frac{1}{2}$  de-

goes east 34 feet to the place of beginning, being the same property conveyed by deed of A. Hershey Bowman to the Massillon Electric and Gas Company recorded in Volume 559, page 47 of the records of Stark County; Also, part of a lot in the Village of Navarre, County of Stark, described as follows: The west  $\frac{1}{2}$  of lot number 41 in the Village of Navarre as the same was laid out, platted and recorded as William S. Wetmore's second addition to the town of Navarre, Ohio, and the same premises described in a deed from Dwight Jarvis, attorney for Mary Upham to Elizabeth Wolf dated the 5th day of July, 1854; or the whole of lot No. 267 according to the numbering of lots in the Village of Navarre, Ohio, as now numbered on the plat of said Village, being the property conveyed by deed of John W. Zintsmaster to Robert R. Choate, recorded in Volume 499, page 541 of the records of Stark County; Also, the following described premises, situate in the Township of Green, County of Wayne, described as follows: Being a parcel or tract of land 50 feet square, in the N. W. corner of an acre tract of land, fronting on Sassafras Street, 50 feet said square tract being of the following described acre tract of land herein conveyed. And known as a part of the east part of the south part of the S. E. Quarter of Section 25, Township 17 of Range 12, Commencing at a point on [fol. 171] the east line of said quarter, 1 chain and 10 $\frac{1}{2}$  links north from the S. E. corner of said quarter; thence on the said E. line, 2 chains and 8 1/3 links; thence west and parallel with the south line of said quarter, 3 chains and 55 $\frac{1}{2}$  links; thence south and parallel with the E. line of said quarter 2 chains and 8 $\frac{1}{2}$  links; thence east and parallel with the south line of said quarter, 3 chains and 55 $\frac{1}{2}$  links to the east line of said quarter, being the place of beginning, containing 1 acre of land, be the same more or less, but subject to all legal highways, being the same property conveyed by deed of Mary S. McDowell to The Massillon Electric and Gas Company, recorded in Volume 169 page 383 of the records of Wayne County; Also the premises situate in the City of Orrville, County of Wayne, described as follows: Being a part of lot 215. The portion hereby conveyed being 33 ft. off the east side of so much of said lot 215, as lies north of the right of way of the W. L. & R. R. Co.'s right of way. Said north line of said right of way being 33 ft. north from the center of

the main track as located on the 16th day of January, 1884, except such part of said 33 foot strip as now lies north of the post and board fence enclosing the yard in front of the building now on said lot and which said north line of the strip, hereby conveyed is further marked by a stone set the first day of July, 1907, at the N. W. corner of said yard fence, which said stone is 91 feet 8 in. north from the S. W. corner of the building now on said lot; and a line drawn due east from said stone to the east line of said lot would mark the northern boundary line of the strip hereby conveyed. Grantors hereby covenant that all the remaining portion of said lot 215, lying north and west from the portion hereby conveyed shall be perpetually kept open and by them and their assigns for common use as a driveway in connection with the alleys to the N. W. of said lot. Reference is hereby made to the Wayne County deed records, Volume 145 page 451 and Volume 156 page 213. Also all of the remaining portion of said lot No. 215, in the [fol. 172] City of Orrville lying north and west from the portion above described. Reference is hereby made to the Wayne County Ohio deed records Volume 164 page 450 being the property conveyed by deed of D. I. Rennekar and wife to The Massillon Electric and Gas Company, recorded in Volume 168 page 15 of the records of Wayne County, together with all and singular, electric light and power plants, gas distribution system, and the improvements, structures, fixtures, buildings, stores, machine shops, repair shops, and other shops, equipment, conduits, mains, tubes, engines, boilers, regulators, meters, poles, machinery, carriages, trucks, horses, harness, implements, furniture, materials, coal, wood, oil, fuel, and other supplies, maps, drawings, profiles, records, deed and all franchises, rights, privileges, easements, licenses, contracts, agreements, consents, leases, trade rights, good-will, accounts and bills receivable, patents and patented inventions and processes, and all other interests of the grantor; all of which personal property is hereby declared to be fixtures and appurtenances; and also all present or future improvements and additions made or to be made upon and to any or all of said electric-lighting, gas light and power plants, lands and property, real and personal, and any and all equipment therefor and renewals or replacements of

the same or of any part thereof or of the appurtenances, and also all other gas, light and power plants, lands, properties, right and privileges of the grantor. And all and singular the tolls, fares, rents, issues, earnings, income, profits and other benefits and advantages of, or in any wise growing out of, all or any of the said several properties and franchises, and all and singular the tenements, hereditaments and appurtenances to any of the said properties belonging, or in any wise appertaining, and the reversion or reversions, remainder or remainders thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in [fol. 173] equity, of the grantor, in and to the same and every part and parcel thereof with the appurtenances. Subject, however, to five hundred and thirty three thousand dollars (\$533,000) principal amount of the bonds of the grantor secured by a mortgage of the grantor to the New York Trust Company as Trustee, dated July 1, 1916, a lien upon the property above described. To have and to hold the same to the only proper use of said The Ohio Public Service Company, its successors and assigns forever. And the said The Massillon Electric and Gas Company, for itself and for its successors and assigns, does hereby covenant with said The Ohio Public Service Company, its successors and assigns, that it is the true and lawful owner of said premises and has full power to convey the same that the title so conveyed is free and unencumbered except as hereinbefore stated, and further that it does warrant and will defend the same against all claim or claims of any and all persons whomsoever.

In Witness Whereof, the said The Massillon Electric and Gas Company, a corporation, by its president and Secretary, hereunto duly authorized, has hereunto set its name and affixed its corporate seal this 29th day of October, in the year of our Lord one thousand nine hundred and twenty one.

The Massillon Electric and Gas Company, by H. H. Ross, President, and C. L. Butler, Secretary.  
(Seal the Massillon Electric and Gas Company,  
Ohio, Incorporated, 1908.)

Signed and acknowledged in the presence of H. A. MacKenzie, C. C. Donns.

STATE OF OHIO,

Cuyahoga County, ss:

Be it remembered that on the 29th day of October, A. D. 1921, before the subscriber, a notary public within and for [fol. 174] said county, personally came H. H. Ross, who is president of said The Massillon Electric and Gas Company, and C. L. Butler, who is the Secretary of said Company, and acknowledged that the name of said Company was subscribed to the foregoing instrument and that the seal affixed thereto is the corporate seal of said Company and that the corporate name was subscribed and said seal attached to the foregoing instrument by the direction and authority of said Company, and that the foregoing conveyance is the free act and deed of said The Massillon Electric and Gas Company, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

C. C. Donns, Notary Public. (Notarial Seal, Cuyahoga County, Ohio.)

Received and recorded October 31, 1921, at 1 o'clock P. M.

O. D. Bruce, Recorder.

Volume 190, Page 334-337.

STATE OF OHIO,

Wayne County, ss:

I, Jesse W. Ebert, County Recorder within and for said County, and in whose custody the records of said County are kept, do hereby certify that the foregoing is a true copy of a deed given by Massillon Electric and Gas Company, to Ohio Public Service Co., Recorded in Volume 190 pages 334-337.

And I further certify that the foregoing has been compared by me with the original record in said Volume 190 and page 334-337 and that the same is a true and correct copy.

In testimony whereof, I herenunto subscribe my name officially and affix my official seal at the Recorder's office at Wooster, Ohio, this 27th day of May A. D. 1924.

Jesse W. Ebert, Recorder. (Seal.)

[fol. 175]

## IN SUPREME COURT OF OHIO

## EXHIBIT "E" IN EVIDENCE

## Assignment

The Massillon Electric & Gas Company, a Corporation duly organized under and by virtue of the laws of Ohio, and having its principal office and place of business in the City of Massillon, Stark County, Ohio, for the consideration of One Dollar (\$1.00) and other goods and valuable considerations received to its full satisfaction of The Ohio Public Service Company, its successors and assigns, a corporation organized under the laws of the State of Ohio, does hereby sell, assign, transfer and set over unto said The Ohio Public Service Company, all of its right, title and interest in and to its franchise rights and privileges in the Village of Orrville, Wayne County, Ohio, however the same may be evidenced or created and particularly all of its right, title and interest in and to a franchise granted to Ansel P. Gans and Mellville D. Wilson, their associates and assigns on February 1, 1892.

This assignment is made subject to all the covenants, terms, conditions and obligations contained in said ordinance above referred to on the part of said Ansel P. Gans and Mellville D. Wilson, their associates, successors and assigns to be performed, and subject to all of the other terms and conditions attached to any of the franchise rights and privileges above referred to, all of which The Ohio Public Service Company, by its acceptance hereof hereby assumes.

In witness whereof, said corporation has caused its corporate seal to be affixed and its corporate name to be signed hereunto by its President and Secretary this 29th day of October, A. D. 1921.

The Massillon Electric & Gas Co., by H. H. Ross,  
President, and C. L. Butler, Secretary. (Seal.)

Signed, acknowledged, and delivered in the presence of  
H. A. Mackenzie, C. C. Downs.

[fol. 176] STATE OF OHIO,  
Cuyahoga County, ss:

Before me, a Notary Public in and for said County, personally appeared H. H. Ross and C. L. Butler, president and secretary, respectively, of The Massillon Electric & Gas Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as president and secretary respectively on behalf of said corporation by authority of its Board of Directors; and that said instrument is the free act and deed of said The Massillon Electric & Gas Company.

In testimony whereof, I have hereunto subscribed my name and affixed my Notarial Seal at Cleveland, Ohio, this 29th day of October, A. D. 1921.

C. C. Downs, Notary Public. (Seal.)

[fol. 177] IN SUPREME COURT OF OHIO

EXHIBIT "F" IN EVIDENCE

In re Joint Application of THE MASSILLON ELECTRIC AND GAS COMPANY and THE ORRVILLE LIGHT, HEAT AND POWER COMPANY for Authority to Purchase and Sell Property

I, J. B. Dugan, The duly qualified and Acting Secretary of the Public Utilities Commission of Ohio, in whose custody the books, papers, documents and records of the said The Public Utilities Commission of Ohio are kept, do hereby certify the following to be a full true and correct copy of the order issued in Proceeding No. 362 before The Public Service Commission, now The Public Utilities Commission of Ohio, In re Joint application of the Massillon Electric and Gas Company and The Orrville Light, Heat and Power Company for authority to purchase and sell property.

In witness whereof, I have hereunto set my hand and affixed the official seal of The Public Utilities Commission (The successor to The Public Service Commission of Ohio),

at Columbus, Ohio, this twenty-first day of March A. D. 1924.

(Signed) J. B. Dugan, Acting Secretary the Public Utilities Commission of Ohio. (Seal.)

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[fol. 178] BEFORE THE PUBLIC SERVICE COMMISSION OF OHIO

No. 362

In the Matter of the Joint Application of THE MASSILLON ELECTRIC AND GAS COMPANY and THE ORRVILLE LIGHT, HEAT AND POWER COMPANY for Authority to Purchase and Sell Property.

The Massillon Electric and Gas Company, a corporation organized under the laws of the State of Ohio, and The Orrville Light, Heat and Power Company, an unincorporated company engaged in the business of a public utility in the village of Orrville, Wayne County, Ohio, having, on the twenty-fifth day of September, 1912, filed their joint petition for the consent and approval of the Commission for the purchase of all the property together with all rights, privileges and franchises now belonging to said The Orrville Light, Heat and Power Company by said The Massillon Electric and Gas Company, and the time for hearing said matter having been fixed for Wednesday, October second, 1912, at three o'clock P. M., and due notice of the time and place of said hearing having been given, and having been heard on said day and the further consideration thereof continued from day to day, the same came on this day for final consideration upon the petition, the evidence and exhibits.

After considering the pleadings, hearing the evidence examining the exhibits and making such further and other inquiry and investigation as the Commission deemed necessary and proper, and it appearing that the service furnished the public will be improved thereby, that the public will be furnished adequate service for a reasonable and just charge, and that no diminution in service will result therefrom, the Commission is satisfied that the prayer of said petition should be granted, It is, therefore,

[fol. 179] Ordered, That said The Orrville Light, Heat and Power Company be, and it hereby is authorized to sell to said The Massillon Electric and Gas Company all of its property, together with all rights, privileges and franchises, as fully set out in the inventory attached to the petition, marked Exhibit "D" and made a part hereof by reference; and said The Massillon Electric and Gas Company hereby is authorized to purchase said property and to pay therefor the agreed price of Twenty Thousand Dollars, (\$20,000.00). It is further

Ordered, That said The Massillon Electric and Gas Company file, forthwith, with the Commission schedules of reasonable rates for its service in the Village of Orrville, Wayne County, Ohio, and territory adjacent thereto now occupied by The Orrville Light, Heat and Power Company. It is further

Ordered, That the authority herein granted may be exercised after such schedule, or schedules, of reasonable rates have been filed by said The Massillon Electric and Gas Company with and approved by the Commission, and not prior thereto.

The Public Service Commission of Ohio, by O. P. Gothlin, Chairman; J. C. Sullivan, O. H. Hughes, Commissioners.

Dated at Columbus, Ohio, this twenty-third day of October, 1912.

[fol. 180] IN SUPREME COURT OF OHIO

EXHIBIT "H" IN EVIDENCE

D. I. Renneckar and Wife  
to

The Massillon Electric and Gas Co.

Warranty Deed 24363

Know all men by these presents, That, Whereas, The Orrville, Light, Heat and Power Company, a corporation organized and formerly existing under the laws of the

State of Ohio, was duly dissolved on the 24th day of September, 1907, and Whereas, prior to its dissolution it duly conveyed by deed, dated the 1st day of July, 1907, and recorded on the 9th day of July, 1907, in the office of the Recorder, in Volume 156 page 213, of Records of Deeds, to D. I. Rennekar, a part of lot No. 215 in the village of Orrville, in the County of Wayne, in the State of Ohio, and also by said deed conveyed to said D. I. Rennekar the franchise under which said grantor operated in said village a public utility, and all electric machinery, poles, wires and lamps, and everything pertaining and belonging to the said lighting plant, And Whereas, the said D. I. Rennecker thereafter carried on the business of said Company; and Whereas, by an order of the Public Service Commission of Ohio, dated the 23rd day of October, 1912, the said D. I. Rennecker, doing business under the name of The Orrville Light, Heat and Power Company, was authorized to sell to The Massillon Electric and Gas Company, a corporation organized and existing under the laws of the State of Ohio, all of said property, together with the rights, privileges and franchises formerly owned by the said Company and then owned by said D. I. Rennekar; and said The Massillon Electric and Gas Company was granted authority to exercise the privileges under this franchise.

Now, therefore, this indenture witnesseth: That we, David I. Rennekar (the D. I. Rennekar above referred to in the recital) and Eliza E. Rennekar, his wife, both of Orrville, Wayne County, in the State of Ohio, the grantors, in consideration of the sum of One Dollar (\$1), lawful money of the United States, received to our full satisfaction [fol. 181] of The Massillon Electric and Gas Company, a corporation organized and existing under the laws of the State of Ohio, with a place of business at Massillon, Stark County, in the State of Ohio, the grantee, do hereby give, grant, bargain, sell and convey unto the said grantee, its successors and assigns, the following described property, premises, and franchises, situated in the City of Orrville, in the County of Wayne, in the State of Ohio, and more particularly known and described as being a part of Lot No. Two hundred and fifteen (215) in said City. The portion hereby conveyed being thirty-three (33) feet off the east side of so much of said Lot numbered two hundred and

fifteen (215) as lies north of the right of way of The Wheeling and Lake Erie R. R. Company's Right of Way. Said north line of said right of way being thirty-three (33) feet north from the center of the main track as located on the 16th day of January, 1884. Except such part of said 33 foot strip as now lies north of the post and board fence inclosing the yard in front of the building now on said lot and which said north line of the strip hereby conveyed is further marked by a stone set the — day of — at the north-west corner of said yard fence, which said stone is ninety-one (91) feet and eight (8) inches north from the south-west corner of the building now on said lot; and a line drawn due east from said stone to the east line of said lot would mark the northern boundary line of the strip hereby conveyed. Grantors hereby covenant that all the remaining portion of said Lot 215, lying north and west from the portion hereby conveyed shall be perpetually kept open by them and their assigns for common use as a driveway in connection with the alleys to the north and west of said lot. Reference is hereby made to the Wayne County, Ohio, deed records, Volume 145, page 451, and Volume 156 page 213. Also, all of the remaining portion of said Lot Number Two Hundred and Fifteen (215) in the City of Orrville, Wayne County, Ohio, lying north and west from the portion above described. Reference is hereby made to the Wayne County, Ohio, deed records, Volume 164, page 450.

[fol. 182] Also all the manufacturing business of myself, David I. Renneckar, doing business under the name and style of the "Orrville Light, Heat and Power Company" (not incorporated) of Orrville, Wayne County, Ohio, including the real estate above described and any other real estate belonging thereto wherever located, all machinery, fixtures, materials, poles, pole lines, transmission lines, supplies used in connection with said business, and also the good will of said business, all franchises, contracts, and agreements and all other property of every sort, kind and nature used or to be used in connection with said business, but excepting (1) all money on hand and in bank and accounts and bills receivable, (2) all office furniture and fixtures located in the Fike Block, Orrville, Ohio, and (3) all residence property and real estate connected therewith.

To have and to hold the above granted and bargained property, premises and franchises, with all the rights, easements and appurtenances thereunto belonging, to the said grantee, its successors and assigns, to its and their own use and behoof forever.

And we do hereby each for ourselves, our heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents we are well and truly seized of the above described property, premises and franchises, the said property and premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same and every part thereof in the manner and form as above written; that the same are free and clear from all encumbrances whatsoever; and that we will and shall for ourselves, our heirs, executors and administrators, warrant and defend said premises with the appurtenances thereunto belonging, unto the said grantee, its successors and assigns forever, against all lawful claims and demands whatsoever.

And that I, the said Eliza E. Renneckar, wife of David I. Renneckar, for the consideration aforesaid, do hereby remise, release and forever quit-claim unto the said grantee, its successors and assigns, of all my right and [fol. 183] title of or to both dower and homestead in the above described premises.

In Witness Whereof, we have hereunto set our hands and seals this 11th day of March, in the year of our Lord one thousand nine hundred and thirteen.

David I. Renneckar. (Seal.) Eliza Renneckar. (Seal.)

Executed in the presence of F. F. Hunter, Levi Brenne-  
man.

STATE OF OHIO,  
Wayne County, ss:

Be it remembered, That on the 11th day of March in the year of o-r Lord one thousand nine hundred and thirteen, before me, the subscriber, a Notary Public in and for said State and County, personally came and appeared the above named David I. Renneckar and Eliza E. Renneckar, his wife, the grantors in the foregoing deed, who duly and

severally acknowledged that they did sign voluntarily the said foregoing deed for the uses and purposes therein mentioned, and that the same is their free act and deed.

In Testimony Whereof, I have hereunto set my hand and official seal of office at Orrville, in the County of Wayne, on the 11th day of March, 1913.

Levi Brenneman, Notary Public. (Notarial Seal  
Wayne County, Ohio.)

Received and recorded March 24th, 1913, at 9 o'clock  
A. M. Joseph Sullivan, Recorder.

[fol. 184] STATE OF OHIO,  
Wayne County, ss:

I, O. D. Bruce, County Recorder within and for said County, and in whose custody the records of said County are kept, do hereby certify that the foregoing is a true copy of a warranty deed given by D. I. Renneckar and wife, to The Massillon Electric and Gas Company Recorded in Volume 168 page 15-17.

And I further certify that the foregoing has been compared by me with the original record in said Volume 168 and page 15-17 and that the same is a true and correct copy.

In testimony whereof, I hereunto subscribe my name officially and affix my official seal, at the Recorder's Office, at Wooster, Ohio, this 12th day of May A. D. 1923.

O. D. Bruce, Recorder.

[fol. 185] IN SUPREME COURT OF OHIO

EXHIBIT "I" IN EVIDENCE

Orrville Light, Heat and Power Company  
to

D. I. Renneckar

Warranty Deed

Know all men by these Presents; that The Orrville Light, Heat & Power Company, of the Village of Orrville, County of Wayne in the State of Ohio, in consideration of

the sum of fourteen thousand (\$14,000.00) dollars, to be paid by D. I. Renneckar, of the Village of Sherrodsburg, County of Carroll and State of Ohio the receipt whereof is hereby acknowledged do hereby grant bargain, sell and convey to the said D. I. Renneckar his heirs and assigns forever, the following Real Estate, situated in the County of Wayne in the State of Ohio, and in the Village of Orrville and bounded and described as follows: Known as being a part of Lot No. two hundred and fifteen (215) in said Village. The portion hereby conveyed being Thirty-three (33) feet off, the East side of so much of said Lot Number two hundred and fifteen (215) as lies north of the right of way of the Wheeling & Lake Erie R. R. Company's right of way. Said north line of said right of way being 33 feet north from the center of the main tract as located on the 16th day of January, 1884, except such part of said 33 ft. strip as now lies north of the post and board fence enclosing the yard in front of the building now on said lot and which said north line of the strip hereby conveyed is further marked by a stone set this day at the north west corner of said yard fence, which said stone is 91 feet and 8 inches north from the south west corner of the building now on said lot; and a line drawn due east from said stone to the east line of said lot would mark the northern boundry line of the strip hereby conveyed. Grantors hereby covenant that all the remaining portion of said lot #215, lying north and west from the portion hereby conveyed shall be perpetually kept open by them and their assigns for common use as a drive way in connection with [fol. 186] the alleys to the north and west of said lot, including also by this conveyance the franchise under which said grantors operate in said village. All electric machinery, poles, wires and lamps, everything pertaining and belonging to said light plant. Also five year contract dated July 15, 1907, for the full term of five years. To have and to hold said premises, with all the privileges and appurtenances thereunto belonging to the said D. I. Renneckar, his heirs and assigns forever.

And the said The Orrville Light, Heat and Power Company, for themselves and its heirs, do hereby covenant with the said D. I. Renneckar, his heirs and assigns, that it was lawfully seized of the premises aforesaid; that the said

premises are free and clear from all incumbrances whatever, and that it will forever Warrant and Defend the same, with the appurtenances, unto the said D. I. Rennekar, his heirs and assigns, against the lawful claims of all persons whomsoever.

In Witness Whereof, the said The Orrville Light, Heat and Power Company, has caused its name and seal to be hereunto affixed by its President and tested by its Secretary in accordance with its resolution adopted by its board of Directors June 27th, 1907, have hereunto set its hand this first day of July in the year of our Lord one thousand nine hundred and seven (1907).

Signed and acknowledged in presence of Jessie B. Axx,  
Charles E. Axx.

The Orrville Light, Heat and Power Company. J.  
A. Wagner, President. J. B. Wagner, Secretary.  
(Corporate Seal The Orrville Light, Heat and  
Power Company, Orrville, Ohio.)

STATE OF OHIO,  
Tuscarawas County, ss:

Be it remembered, That on this first day of July, A. D. [fol. 187] 1907, before me, the subscriber, a Notary Public in and for said County, personally came the above named J. A. Wagner, President and J. P. Wagner, Secretary of the Orrville Light, Heat and Power Company the grantor personally known to me and acknowledged the execution of the foregoing deed and the attaching thereto of the Corporate seal of said Company to be their free and Voluntary act and deed as individuals and either free and Voluntary act and deed as such president and secretary and the free and corporate act and deed of said Company duly Authorized by its Board of Directors. In Testimony whereof I have hereunto subscribed my name and affixed my official seal, on the day and year last aforesaid.

Charles E. Axx, Notary Public. (Notarial Seal,  
Tuscarawas County, Ohio.)

Received and recorded July 9th, 1907, at 9 o'clock A. M.  
Albert S. Sawyer, Recorder.

State of Ohio,  
Wayne County, etc:

I, O. D. Bruce, County Recorder within and for said County, and in whose custody the records of said County are kept, do hereby certify that the foregoing is a true copy of a Warranty Deed given by Orrville Light, Heat and Power Company to D. L. Rennecker, Recorded in *in* Volume 156 Page 213-214.

And I further certify that the foregoing has been compared by me with the original record in said Volume 156 and page 213-214 and that the same is a true and correct copy.

In testimony whereof, I hereinunto subscribe my name officially and affix my official seal, at the Recorder's Office, at Wooster, Ohio, this 12th day of May A. D. 1923.

O. D. Bruce, Recorder.

[fol. 188] In Supreme Court of Ohio

**Plaintiff "J" vs. Defendants**

These articles of incorporation of The Orrville Light, Heat and Power Company witnesseth, That we, the undersigned,\* all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Orrville Light, Heat and Power Company.

Second. Said corporation is to be located at Orrville, in Wayne County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of lighting the Village of Orrville in Wayne County, Ohio, by Electricity and to furnish heat and power for other manufacturing purposes.

Fourth. The capital stock of said corporation shall be Twenty Thousand Dollars, (\$20,000.00), divided into Two

\* All or a majority.

hundred (200) shares of One Hundred Dollars, (\$100.00) each.

In witness whereof, We have hereunto set our hands, this third day of January, A. D. 1893.

J. A. Wagner, David King, George W. King, John W. Wagner, J. P. Wagner.

THE STATE OF OHIO,

County of Tuscarawas, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said county, this third day of January A. D. 1893, the above named J. A. Wagner, David King, George W. King, John W. Wagner and J. P. Wagner who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year [fol. 189] last aforesaid.

George W. Betscher, Notary Public. (Seal.)

THE STATE OF OHIO

County of Tuscarawas, ss:

I, John C. Donahay, Clerk of Common Pleas within and for the county aforesaid, do hereby certify that George W. Betscher whose name is subscribed to the foregoing acknowledgment as a Notary Public was at the date thereof a Notary Public in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at New Philadelphia, this 24th day of January, A. D. 1893.

John C. Donahay, Clerk. (Seal.)

[fol. 190] UNITED STATES OF AMERICA,  
State of Ohio:

Office of the Secretary of State

I, Thad H. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation The Orrville Light, Heat and Power Company filed in this office on the 9th day of January, A. D. 1893 and recorded in Volume 60, page 49, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 24th day of May A. D. 1924.

(Signed) Thad H. Brown, Secretary of State.  
(Seal.)

[fol. 191] IN SUPREME COURT OF OHIO

EXHIBIT "K" IN EVIDENCE

Resolution

Notice to the Ohio Public Service Company of Termination of Franchise granted February 1, 1892, to Aurel P. Gans and Mellville D. Wilson, their associates, successors, and assigns, and to remove its poles, lines and equipment, wires, guy wires, cross-arms, and all electrical equipment from the streets, lanes, alleys, avenues, and public places of the village of Orrville, Ohio.

Be it resolved by the Council of the Village of Orrville, State of Ohio, not waiving their claim that said rights, privileges and franchises granted to Aurel P. Gans and Mellville D. Wilson, their associates, successors and assigns, including The Ohio Public Service Company, ceased and terminated on the 15th day of July, 1917, and not waiving the claim of the said village of Orrville, that said associates successors and assigns of said Gans and Wilson, including said The Ohio Public Service Company, have forfeited all rights, privileges and franchises granted by an Ordin-

uance of the Village of Orrville, Ohio, passed on the first day of February, 1892, and recorded in Volume 1, Page 32, of the Ordinance Records of said Village of Orrville, by reason of the abandonment of said rights, privileges and franchises and by not performing the terms and conditions of said franchises, and

Whereas, The Ohio Public Service Company claim to be the successors of Aurel P. Gans and Melville D. Wilson to all the rights, privileges and franchises granted to said Gans and Wilson by virtue of said Ordinance of the Village of Orrville, passed on the first day of February, 1892, and recorded in Volume 1, page 32 of the Ordinance Records of said Village of Orrville, Ohio, and

Whereas, said Ordinance does not specify the length of duration of said franchise, and

[fol. 192] Whereas, said Ordinance has been repealed by said council.

Section 1. That all rights, privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including said The Ohio Public Service Company be and the same are hereby terminated and ended.

Section 2. That the said The Ohio Public Service Company are hereby notified to remove all of their poles, wires, guy wires, cross arms, insulators and other electrical equipment now occupying the streets, lanes, alleys, avenues and public places of said Village of Orrville, Ohio, within thirty (30) days from the receipt of a copy of this resolution.

Section 3. That a copy of this resolution be served upon said The Ohio Public Service Company by the Mayor of said Village of Orrville.

Passed June 18, 1923.

E. L. Kinney, Mayor.

Attest: A. Jenny, Clerk.

Published in the Orrville Courier-Crescent June 22 and 29, 1923.

Ordinance repealing an ordinance providing for electric light, heat, and motive power in the village of Orrville, Wayne County, Ohio, said ordinance passed February 1st, 1892, and recorded in volume 1, page 32, of the ordinance records of said village.

Be it ordained by the Council of the Village of Orrville, State of Ohio, and it is hereby ordained:

Section 1. That an ordinance providing for electric light, heat and motive power in the Village of Orrville, Wayne County, Ohio, passed and adopted February 1, 1892, and recorded in Volume 1, Page 32, of the Ordinance Records of said Village, be and is hereby repealed.

[fol. 193] Section 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed June 18, 1923.

E. L. Kinney, Mayor.

Attest: A. Jenny, Clerk.

Published in the Orrville Courier-Crescent June 22 and 29th, 1923.

[fol. 194]

IN SUPREME COURT OF OHIO

EXHIBIT "L" IN EVIDENCE

July 16, 1923.

To the Village of Orrville, Ohio, and the Council of said Village, Orrville, Ohio.

Attention E. L. Kinney, Mayor; A. Jenny, Clerk

GENTLEMEN: This is to notify you that the undersigned does not recognize as valid a certain ordinance passed by the Village Council of Orrville on June 18, 1923, under suspension of rules, by which it was sought by said Council to repeal an ordinance providing for electric light, heat and motive power in said Village as passed and adopted on February 1, 1892 and recorded in Volume 1, Page 32 of the

Ordinance Records of said Village nor the resolution passed by said Council under suspension of rules on said date attempting to notify The Ohio Public Service Company of the termination of said franchise granted February 1, 1892 to Gans and Wilson, their associates, successors and assigns, and to remove its poles, lines and equipment, wires, guy wires, cross-arms, and all electrical equipment from the streets, lanes, alleys, avenues and public places of the Village of Orrville, Ohio within the period of thirty (30) days from the receipt of a copy of said resolution.

The undersigned regards the passage of both ordinance and resolution as an unwarranted exercise of the legislative power by said Council, and that the same, if enforced, would constitute a taking of our Company's property without due process of law and be violative of the contractual rights and privileges granted by said ordinance and franchise of 1892, and in direct controvention of both the constitution of the State of Ohio and the Federal Constitution. [fol. 195] The undersigned will, therefore, resist by whatever measures may be necessary and legal any attempt on the part of said village, its officials, servants, employees, or agents, to remove any of said equipment or the property of the undersigned from any of the streets, alleys or public places of said Village, and hereby gives notice that it has not and does not intend to abandon or surrender its rights, or discontinue any of its service in said Village and that it is now ready and at all times has been ready to serve with electric light and power in accordance with the terms of said franchise, the said Village and the inhabitants thereof.

Yours truly, The Ohio Public Service Company.  
(Signed) H. H. Ross. H. H. Ross, Manager Massillon Division.

[fol. 196] IN SUPREME COURT OF OHIO

## EXHIBIT "M" IN EVIDENCE

## SUPREME COURT OF OHIO

DRAVO-DOYLE COMPANY, Plaintiff in Error,

vs.

VILLAGE OF ORRVILLE, Defendant in Error

## CAPTION

Error to Court of Appeals, Wayne County, Ohio

## Record

Taggart, Weygandt and Ross, S. G. Rogers, Attorneys for Plaintiff in Error.

Clyde Merchant and G. A. Stark, Attorneys for Defendant in Error.

Filed June 16, 1915, Supreme Court of Ohio. Frank E. McKean, Clerk.

Filed September 30, 1924, Supreme Court of Ohio. Seba H. Miller, Clerk.

[fol. 197] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION—Filed May 24, 1915

The plaintiff in error, Dravo-Doyle Company, says that it is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and is and has been for two years and longer last past duly authorized to transact business in the State of Ohio; that the defendant in error, the Village of Orrville, is a municipal corporation duly organized and existing under and by virtue of the laws of the State of Ohio.

Plaintiff in error further says that at the January Term, A. D. 1915, of the Court of Appeals of Wayne County, Ohio,

the defendant in error, the Village of Orrville, recovered a judgment against the plaintiff in error in a certain action therein pending wherein this plaintiff in error was plaintiff in error, and the defendant in error herein was defendant in error. In said action this plaintiff in error sought to reverse the judgment of the Court of Common Pleas of Wayne County in favor of the defendant in error. A transcript of the docket and journal entries in said cause, [fol. 198] together with the original pleadings, files and bill of exceptions, are filed herewith.

Plaintiff in error says there is manifest error in the record, proceedings and judgment of said Court of Appeals in this, towit:

1. Said Court erred in sustaining the judgment, findings and orders of the Court of Common Pleas.
2. Said Court erred in not reversing the judgment, findings and orders of the Court of Common Pleas.
3. Said court erred in not rendering judgment in favor of this plaintiff in error and in rendering judgment in favor of the defendant in error.
4. Said Court erred in holding that the answer of the defendant in error set forth a defense in said action in the Court of Common Pleas.
5. Said Court erred in holding that Section 3990 of the General Code of Ohio is not in conflict with Article 18 of the Amended Constitution of the State of Ohio.
6. Said Court erred in not holding that Section 3990 of the General Code of Ohio was unconstitutional and void.
7. Said judgment is in conflict with and in violation of Article 14, Section 1, of the amendments to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law.
8. Said judgment is in conflict with and in violation of Article 1, Section 10 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contract.

[fol. 199] 9. Said judgment of the Court of Appeals is in conflict with and in violation of Article 1, Section 10 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, in that said judgment impairs the obligation of a contract.

10. Said judgment is in conflict with and in violation of Article 14, Section 1 of the amendments to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, in that it deprives this plaintiff in error of property without due process of law.

11. Said judgment is in conflict with and in violation of Article 1, Section 16 of the Bill of Rights of the State of Ohio, which provides that all Courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and justice administered without denial or delay, in that it deprives this plaintiff in error of remedy by due course of law for injury done him in his property.

12. Said judgment is contrary to law.

13. Said judgment is contrary to the evidence.

14. Said judgment is contrary to the conceded and agreed facts apparent in the record.

15. Said judgment is in conflict with and in violation of the Constitution of the State of Ohio and the Constitution of the United States.

16. Said Court erred in not sustaining the motion of plaintiff in error for a new trial.

Wherefore plaintiff in error prays that said judgment [fol. 200] of the Court of Appeals may be reversed, and that it may be restored to all things it has lost by reason thereof.

Taggart, Weygandt and Ross, S. G. Rogers, Attorneys for Plaintiff in Error.

## IN SUPREME COURT OF OHIO

## WAIVER OF SUMMONS

Summons in error is waived and the appearance of the defendant in error herein is hereby entered.

Clyde Merchant and G. A. Starn, Attorneys for Defendant in Error.

[fol. 201] IN COURT OF APPEALS OF WAYNE COUNTY, OHIO

No. 646

DRAVO-DOYLE COMPANY, Plaintiff in Error,

vs.

THE VILLAGE OF ORRVILLE, Defendant in Error

## DOCKET ENTRIES

1915, January 20.—Transcript filed.

1915, January 20.—Eight original papers filed.

1915, January 20.—Petition in error filed.

1915, January 20.—Waiver of service filed.

1915, January 20.—Bill of Exceptions filed.

1915, February 4.—Three copies brief (plaintiff) filed.

1915, February 4.—Three copies amended brief (plaintiff) filed.

1915, February 16.—Three copies brief (defendant) filed.

Summons in error is waived and the appearance of the defendant in error is entered. Village of Orrville, by G. A. Starn and Clyde Merchant, attorneys for defendant in error.

January Term, 1915, to wit, January 28, 1915.—Submitted; counsel for defendant in error to file reply brief in twenty days from January 27, 1915.

1915, May 6.—Judgment affirmed. J. 2, p. 435.

## [fol. 202] JOURNAL ENTRY OF JUDGMENT

The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said The Dravo-Doyle Company, plaintiff in error herein, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas of Wayne County, Ohio, filed herewith in the said cause, wherein The Dravo-Doyle Company was plaintiff and the Village of Orrville was defendant, mentioned and referred to in said petition in error and was argued by counsel; upon consideration whereof the Court finds that there is no error manifest upon the face of the record in said orders and judgment of said Court of Common Pleas.

It is thereupon considered, ordered and adjudged by this Court, that the judgment and proceedings of the said Court of Common Pleas, in said cause in favor of the said defendant in error and against the said plaintiff in error be, and the same hereby are in all things affirmed, there being, however, in the opinion of the Court reasonable ground for this proceeding in error.

It is further considered and ordered that the plaintiff in error pay the costs of this proceeding in error, taxed at \$ —, and in default thereof that execution issue therefor.

To all of which findings, judgment and decree and affirmance of said judgment the plaintiff in error excepts and gives notice of its intention to prosecute error to the Supreme Court of Ohio.

Ordered, that a special mandate be sent to the Court of Common Pleas of Wayne County to carry this judgment, order and decree into execution.

(Duly certified.)

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## [fol. 203] IN COURT OF APPEALS OF WAYNE COUNTY

PETITION—Filed January 20, 1915

Plaintiff in error, Dravo-Doyle Company, says that at the October Term, 1914, of the Court of Common Pleas of Wayne County, defendant in error, recovered a judgment

by the consideration of said court against plaintiff in error in an action then pending therein, wherein plaintiff in error was plaintiff and defendant in error was defendant, a transcript of the docket and journal entry whereof is filed herewith.

There is error in said record and proceedings in this, to wit:

1. Said Court erred in overruling the motion of plaintiff in error for a new trial.
2. The facts set forth in said answer are not sufficient in law to constitute a defense in said action.
3. Said judgment was given for the said defendant when it ought to have been given for the said plaintiff.
4. Other errors apparent on the record to the prejudice of the plaintiff in error.

Plaintiff in error therefore prays that said judgment may be reversed and that it may be restored to all things it has lost by reason thereof.

Rogers, Mather and Nesbit and Taggart, Weygandt and Ross, Attorneys for Plaintiff in Error.

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[fol. 204] IN COURT OF APPEALS OF WAYNE COUNTY

WAIVER OF SUMMONS

Summons in error is waived and the appearance of the defendant in error is entered.

Village of Orrville, by G. A. Starn and Clyde Merchant, Attorneys for Defendant in Error.

[fol. 205] IN COURT OF COMMON PLEAS OF WAYNE COUNTY,  
OHIO

No. 24618

DRAVO-DOYLE COMPANY, Plaintiff,

vs.

THE VILLAGE OF ORRVILLE, Defendant

## DOCKET ENTRIES

1915, January 7.—Petition filed.

1915, January 7.—Precipe filed.

1915, January 7.—Waiver of service filed.

1915, January 14.—Answer filed.

1915, January 18.—Reply filed.

1915, January 19.—Agreed statement of facts filed.

1915, January 19.—Motion for new trial filed.

October Term, 1914, to wit, January 19, 1915.—Judgment for defendant; petition dismissed; judgment for costs; exceptions; see entry. J. 62, p. 444.

1915, January 19.—Motion for new trial overruled; exceptions. J. 62, p. 445.

And afterwards, to wit, on the nineteenth day of January at and during the October Term of said Court, A. D. 1914, an entry was made in this cause upon the journal of said court which is in the words and figures following, to wit:

[fol. 206] IN COURT OF COMMON PLEAS OF WAYNE COUNTY

## JOURNAL ENTRY OF JUDGMENT

This day this cause came on to be heard on the pleadings and agreed statement of facts, and the parties hereto having waived a jury and agreed to submit this cause to the Court, same was submitted upon the pleadings and agreed statement of facts, and no further evidence was offered by the parties hereto. An- the Court upon due consideration finds the issues in favor of the defendant. It is therefore considered by the Court that the said petition be dismissed and the defendant recover its costs herein expended, taxed

at §— and that plaintiff pay its own costs, to all of which the plaintiff at the time excepted and still excepts.

This day this cause came on to be heard on the motion for a new trial filed by the plaintiff herein. Upon consideration whereof the Court overrules said motion, to the overruling of which motion the plaintiff at the time excepted and still excepts.

(Duly certified.)

[fol. 207] In Court of Common Pleas of Wayne County

Plaintiff—Filed January 7, 1913

[Title omitted]

Plaintiff is, and for the period of two years last past has been a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and is, and was during said period duly authorized to transact business in the State of Ohio.

Said defendant, the Village of Orrville, is, and for the period of two years and longer last past has been, a municipal corporation duly organized and existing under and by virtue of the laws of the State of Ohio.

Plaintiff further says that said defendant, the Village of Orrville, is, and during the period aforesaid has been, a village in which there is situated a municipal water works owned and operated by said village, supplying said village and the inhabitants thereof with water; that within the period aforesaid the council of said village duly authorized an electric lighting plant to be constructed, to be owned and operated by said village; that there is, and for the period of two years and longer last past has been in existence in said village, a board of trustees of public affairs, [fol. 208] consisting of three members, residents of said village, which said board of trustees of public affairs is, and during the period aforesaid has been, performing and exercising the powers and duties delegated to said board by the laws of the State of Ohio.

Plaintiff further says that said board of trustees of public affairs duly advertised for bids and proposals for

building additions to a certain building already owned by said village, erecting a stack, furnishing boilers, engines, generators, pole lines, lamps and other necessary equipment for the building, construction and equipment of an electric lighting plant to be owned by said village, for the purpose of supplying said village and its inhabitants with light, heat and power, which said advertisement was published in the Cherville Standard-Courier, a newspaper of general circulation in said village and in said Wayne County, continuously for two consecutive weeks, commencing on the thirtieth day of January, A. D. 1914; that said action was in substance and effect that said proposals and bids would be received until twelve o'clock, noon, on the twenty-eighth day of January, A. D. 1914, by the board of trustees of public affairs of the Village of Cherville, at the office of said board, for building additions, erecting stacks, furnishing boilers, engines, generators, pole lines, lamps and other equipment for a municipal lighting plant for the Village of Cherville, in accordance with certain plans and specifications therefore duly prepared for said village, which said plans and specifications were on file [Vol. 209] in the office of the board of trustees of public affairs of said village, and in the office of Frank R. Consulting Engineers, 316 Engineers Building, Cleveland, Ohio; that said advertisement, among other things, required that the bids and proposals must state the full name of every person or company interested in it, and should be accompanied by a certified check on a solvent bank for a sum not less than 5% of the total amount of the bid, for labor, machinery, material or apparatus, as a guarantee that if the bid were accepted, a contract would be entered into and performance of the same promptly arranged. Said advertisement further required that if both labor and material were bid for, they should be separately stated, and the price thereof separately stated.

Plaintiff further says that said plans and specifications upon which bids and proposals were based, in substance of said advertisement, among other things called for one horizontal pump, Cottles, non priming, valve type, mounted ready for operation.

Plaintiff further says that in conformity to said action and advertisement, it submitted a bid and proposal for

furnishing the engine last referred to, and erecting the same at said lighting plant, for the sum of twenty-five hundred eighty (\$2,580) dollars; that said bid was the lowest and best bid; that on the thirtieth day of January A. D. 1914, said board of trustees of public affairs of said village duly accepted plaintiff's said bid, and thereafter, to wit, on or about the fifteenth day of February, A. D. [fol. 210] 1914, said board of trustees of public affairs of the village of Orrville, on behalf of said village, duly entered into a written contract with this plaintiff for said engine, a copy of which said written contract is hereto attached and marked, "Exhibit A;" that by the terms of said written contract plaintiff agreed to furnish to said village, one 13 x 29 non-reversing gear ball engine, together with all appliances, and to erect the same, for the sum of twenty-five hundred eighty (\$2,580) dollars; that by the terms of said written agreement it was further provided that if a certain side track which said village was about to cause to be constructed to its said lighting plant, was not ready for use at the time said engine was ready to be delivered at said plant in Orrville, the plaintiff was to be allowed the reasonable cost of hauling said engine from the car to said plant in the Village of Orrville, not exceeding one hundred fifty (\$150) dollars; that said Village of Orrville agreed to pay, in consideration for said engine, and the performance of said contract on the part of the plaintiff, as follows: 30% of the contract price upon receipt of the invoice by the Village of Orrville; 25% of the contract price upon the erection of the engine at the plant; 20% of the contract price upon the completion of the test of said engine by the engineer in charge of said work, and the filing of his written acceptance of said engine with the Village of Orrville, and the balance of said contract price, sixty days after test and acceptance.

Plaintiff further says that before said written contract [fol. 211] and agreement was entered into, to wit, on the tenth day of February, A. D. 1914, the clerk of said Village of Orrville duly certified to the council and to the board of trustees of public affairs of said village, that the money required for said contract and agreement was in the treasury to the credit of the electric light fund, which was the fund from which the consideration for said contract was

to be paid, and was not appropriated for any other purpose.

Plaintiff further says it duly executed and delivered to the defendant a good and sufficient bond to the acceptance of the defendant agreeable to the third paragraph of the article of agreement marked Exhibit "A".

Plaintiff further says that it has duly performed all and singular the terms and conditions of said written contract on its part to be performed; that it has duly delivered, installed and erected said engine, and the same has been tested by the engineer of said village, and the written acceptance by said engineer has been filed with said village, and more than sixty days has elapsed since said test and acceptance.

Plaintiff further says that said side track was not completed at the time said engine was ready for delivery, and the same could not be delivered to said plant on said side track; that plaintiff incurred a reasonable expense in the sum of \$150 for hauling charges in conveying said engine from the car to said plant.

Plaintiff further says that said village has paid upon said contract the sum of twelve hundred (\$1,290) dollars, [fol. 212] and no more; that there is due the plaintiff from the defendant the balance of fourteen hundred forty (\$1,440) dollars with interest from the first day of September, A. D. 1914.

Wherefore, plaintiff claims judgment against the defendant in the sum of fourteen hundred forty (\$1,440) dollars with interest from the first day of September, A. D. 1914.

Rogers, Mather and Nesbit and Taggart, Weygandt and Ross, Attorneys for Plaintiff.

(Duly verified.)

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EXHIBIT "A" TO PETITION

Article of Agreement

This article of agreement entered into by and between the Village of Orrville, in Wayne County, Ohio, by its duly elected, qualified and acting board of trustees of public

affairs, hereinafter designated as the first party, and the Dravo-Doyle Company, of Pittsburgh, Pa., hereinafter designated as the second party, Witnesseth:

Whereas, the said first party on the twenty-eighth day of January, A. D. 1914, received a proposal from said second party for the furnishing and erecting of a certain Ball engine and other appliances, as are set forth in and in accordance with specifications, a copy of which forms a part of [fol. 213] this contract, which said proposal was on the thirtieth day of January, A. D. 1914, declared by said first party to be the lowest and best proposal, and was on the date last mentioned above accepted as such, now

Therefore, It is agreed by and between the said first party and the said second party as follows:

First. That for and in consideration of the payments and covenants hereinafter mentioned, said second party agrees to furnish and erect, in accordance with the specifications hereto attached, which said specifications are hereby incorporated in, and made a part of, this contract, and are marked Addenda "A", and the specifications, guarantees, statements and proposals, not in conflict with this contract and the specifications forming a part thereof, contained in said second party's proposal as submitted and accepted, one (1) 13 x 20 non-releasing gear ball engine, together with any and all other appliances, etc., as set forth in the specifications.

Second. The said second party also agrees and promises to furnish the said ball engine and erect the same at such place or places as are indicated on the plans and in accordance with the specifications within a period of — days from and after the signing of this contract.

Third. The said second party also agrees and promises to execute and deliver to the said first party a good and sufficient bond, to the satisfaction of the first party, in the sum of fourteen hundred dollars (\$1,400), conditioned on the full and faithful performance of this contract; the saving harmless of the first party, its officers, boards and [fol. 214] agents, collectively and individually, from any and all suits for damages, royalties or other causes of action, arising out of or due in any manner to the failure, neglect or other wrongful act of said second party, its

agents or employees; and the repairing and making good of all damages due to inherent defect in material or from poor workmanship, either in construction or erection, in said engine, for and during a period of one (1) year from and after delivery thereof.

Fourth. The said first party agrees to pay to the said second party, upon the full and faithful performance of this contract, and the said second party agrees to accept, as payment in full for the furnishing and erecting of said Ball engine, etc. under the terms and provisions of this contract, the sum of twenty-five hundred and eighty dollars (\$2,580) at the times and in the amounts as follows:

- (a) Fifty (50) per centum of the contract price upon receipt of the bill of lading by the first party.
- (b) Twenty-five (25) per centum of the contract price upon erection of engine, etc. at the plant in accordance to the plans and the specifications.
- (c) Twenty (20) per centum of the contract price upon completion of test by the engineer and the filing of his written acceptance of the said engine, etc., with the first party.
- (d) Five (5) per centum of the contract price sixty (60) days after the test and acceptance.

(e) In case the test by the engineer is not made within thirty (30) days after machinery is erected, then and in [fol. 215] that case the final twenty-five (25) per centum of the contract price becomes due and payable thirty (30) days after completion of erection.

In testimony whereof, The said first party and the second party have caused their respective names to be affixed to this article of agreement, which is executed in duplicate, and the same to be subscribed by its proper officers, this — day of February, A. D. 1914.

Village of Orrville, Ohio, by J. W. Kropf, by F. W. Kinney, by H. D. Wyre, Board of Public Affairs.

Witness: E. C. Williamson, W. R. Cook.

Dravo-Doyle Company, by Thomas E. Doyle, President.

Witness: Frank S. McClintock.

It is mutually understood and agreed by and between the said first party and said second party that in case the side track at the light plant is not ready for use at the time the engine sold by said second party to said first party is ready to be delivered at the plant in Orrville, Ohio, then and in that case haulage charges, not to exceed one hundred and fifty dollars (\$150), shall be added to the contract price [fol. 216] of the machinery mentioned in this contract. The above contract is altered according to the provisions of this rider which is attached to and made a part of this contract, and the same is hereby ratified by the parties to this agreement this — day of March, 1914.

Board of Public Affairs, by J. W. Kropf, President.  
Dravo-Doyle Company, by Thos. E. Doyle, President.

It is mutually understood and agreed by and between the said first party and said second party that subdivision (a) of section (4) of this agreement be altered and changed to read as follows:

(a) Fifty (50) per centum of the contract price upon receipt of invoice by the first party.

The above contract is altered according to the provisions of this said rider, which is attached to and made a part of this said contract, and this said rider and the provisions contained therein are hereby ratified and adopted by the parties of this agreement this twenty-fifth day of May, A. D. 1914.

(Signed) Village of Orrville, Ohio, by J. W. Kropf,  
by F. W. Kinney, by H. D. Wyre, Board of Public  
Affairs. Dravo-Doyle Company, by Thos. E.  
Doyle, President.

May 26, 1914.

[fol. 217] IN COURT OF COMMON PLEAS OF WAYNE COUNTY

## WAIVER OF SUMMONS

The defendant, the Village of Orrville, hereby waives the issuing and service of summons and voluntarily enters its appearance herein.

Clyde Merchant and G. A. Starn, Attorneys for Defendant.

IN COURT OF COMMON PLEAS OF WAYNE COUNTY

ANSWER—Filed January 14, 1915

Now comes the defendant and for its answer to plaintiff's petition says that it admits that the plaintiff is, and for the period of two years last past has been, a corporation as alleged in the petition; admits that the defendant is a municipal corporation as alleged in the petition; admits that the defendant is, and during the past two years has been, a village in which there is situated a municipal water works owned and operated by said village and supplying water to it and the inhabitants thereof; admits that there is, and for the period of two years and longer last past has been in existence in said village a board of trustees of public affairs, consisting of three members, residents of said village, which said board of trustees of public affairs is and has been performing and exercising the powers and duties delegated to said board by the laws of the State of Ohio, and denies each and every other allegation contained in said petition, except such as are herein-after admitted to be true.

[fol. 218] Further answering this defendant says that on July 21, 1913, this defendant by its council passed a resolution declaring it necessary to issue bonds of said village in the sum of \$41,000 for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances necessary or desirable for the operation of an electric lighting, heating and power plant in said village; that on the twenty-sixth day of August, 1913, under authority of said resolution and in accordance therewith it published notice of election, and an election was held in said

village upon the question of the issuance of said bonds for said purpose, and that said question was, at said election carried by an affirmative vote of more than two-thirds of the qualified electors of said village: that on the seventeenth day of November, 1913, defendant, by its council, passed an ordinance providing for the issuance of said bonds for the purposes and in the amount set forth in said resolution of July 21, 1913; that in pursuance of said ordinance and after advertisement therefor, on the twenty-fourth day of December, 1913, bids were received for the sale of said bonds and the same were sold to the Mellon National Bank of Pittsburgh, Pa., and said bonds were issued and delivered and the money therefor received by this defendant on February 3, 1914; that beginning January 12, 1914, defendant advertised for bids for the building, and for the construction of a stack and for furnishing boilers, machinery, generators, poles, lines, lamps, etc., for a municipal electric lighting plant for defendant, in accordance with certain specifications theretofore adopted by the defendant, [fol. 219] and in accordance thereto, on the twenty-eighth day of January, 1914, received bids for the furnishing of said material and for the construction of said electric light plant; that among the bids received was the bid of plaintiff for the furnishing of one 250 K. V. A. generator and one 18 x 36 releasing gear Corliss engine, erected and ready for operation, which bid of plaintiff's was by defendant accepted and a contract attempted to be entered into therewith. A copy of said contract is attached to plaintiff's petition.

Further answering defendant says that afterward, to wit, on the twelfth day of March, 1914, the Massillon Electric and Gas Company filed its petition and thereby commenced an action in the Court of Common Pleas of Wayne County, Ohio, against this defendant and others, being cause No. 24440, wherein it was alleged that said Massillon Electric and Gas Company is a corporation organized under the laws of the State of Ohio, and engaged in business in the Village of Orrville. If further alleged in said petition that it owns and operates, and at all times mentioned in said petition, owned, operated and maintained, in said Village of Orrville an electric works and plant theretofore erected in said village under an existing

franchise duly granted by said village. It further alleged that at the time of the filing of said petition it was supplying and had been supplying electricity from said light plant for lighting and power purposes in said village, including municipal and private lighting, and that it had complied with the terms, conditions and requirements of its said franchise. Said the Massillon Electric and Gas Company [fol. 220] in its petition further alleged that neither said village nor its council, mayor, Board of Public Affairs or any authorized agent or officer thereof, had ever offered or made any effort to purchase from it the said electric lighting and power plant and works owned by it, and located in said village, as is required by the laws of the State of Ohio, and especially by the provisions of Section 3990 of the General Code of Ohio. Said the Massillon Electric and Gas Company, in its said petition asked that a temporary injunction be granted by the Court against this defendant restraining it from entering into a contract or contracts for the erection of an electric lighting and power plant for said Village of Orrville, and restraining it from entering into any contract for erecting any buildings or additions to buildings, or for the purchase of property, real or personal, stacks, boilers, machinery, generators, poles, lamps, equipment or appliances whatsoever for the purpose of erecting or completing such an electric light plant, and restraining said defendant from erecting or performing any acts toward the erection of such an electric light plant, and restraining it from the execution or performance of any contract for such purpose, and restraining it from expending or authorizing the expenditure of any sums of money whatsoever for the purpose of carrying out or fulfilling any such contracts, and that upon the final hearing of said cause that said temporary restraining order be made permanent in all respects.

Further answering this defendant says that upon the filing of said petition by the Massillon Electric and Gas Company a temporary restraining order was by the Court, granted as prayed for in said petition; that upon the final [fol. 221] hearing of said cause said temporary restraining order was by the Court dissolved and said petition dismissed, and that thereupon an appeal was perfected to the Court of Appeals of Wayne County, Ohio, by said the

Massillon Electric and Gas Company, which was cause No. 637 in said Court of Appeals; that upon the hearing of said cause in said Court of Appeals said temporary restraining order was by the consideration of the court made permanent in all respects, and it was by said Court of Appeals adjudged and decreed that this defendant, the Village of Orrville, be enjoined from doing all and several the things prayed for by said Massillon Electric and Gas Company in its petition in said actions. A copy of the judgment and order of said Court of Appeals as entered of record is hereto attached, marked "Exhibit A," and made a part hereof. A copy of the Court's opinion in said cause is hereto attached, marked "Exhibit B."

Further answering this defendant says that thereafter, to wit, on the — day of March, 1914, the Massillon Electric and Gas Company, as a taxpayer, on behalf of and for the use of the Village of Orrville, filed its petition in the Court of Common Pleas, Wayne County, Ohio, against this defendant and others and thereby commenced an action in said court, being cause No. 24458, wherein the said the Massillon Electric and Gas Company alleged that it is a corporation organized under the laws of Ohio and engaged in business in the Village of Orrville; that it is a taxpayer in said Village of Orrville, and brings its action as such taxpayer on behalf of and for the use of said village on account of the refusal of the village solicitor to bring the [fol. 222] same. It further alleged that it owns and operates and that at all times mentioned owned, operated and maintained in said village an electric works and plant theretofore erected in said village under an existing franchise duly granted by the village council, and that it was at the time of filing said petition, and at all times mentioned in said petition, engaged in supplying from said plant electricity for lighting and power purposes in said village, both public and private. It further alleged in its said petition the enactment and passage of the resolution and ordinances heretofore mentioned in this answer, and among other things alleged that the publication of the notice of election and the notice of the sale of bonds was commenced before the expiration of ten days after the passage of said resolution and ordinances, respectively, heretofore mentioned as passed by council of the Village of

Orrville. It further alleged in substance that because of the manner in which said resolution and ordinances were passed and the publication of notices required thereunder that the same were null and void and that the Village of Orrville, this defendant, in letting the contract to plaintiff herein, as well as the other contracts entered into by this defendant with various parties acted without authority and said contracts were null and void. It further alleged that said \$41,000 bond issue was not offered to the State Liability Board of Awards before being advertised for sale. In said petition said the Massillon Electric and Gas Company asked that a temporary injunction be granted against this defendant, restraining it from entering into [fol. 223] any contract for the erection of an electric light and power plant for said Village of Orrville and restraining it from entering into any contract for the purchase of any property or equipment for the purpose of such erection, and restraining it from issuing or selling bonds in the aggregate sum of \$13,500, and restraining it from expending any portion or all of the proceeds of the sale of the bonds of said village in the aggregate sum of \$41,000, and restraining it from levying a tax upon the property in said Village of Orrville for the purpose of paying interest on said bonds so sold or from in fact, paying any interest thereon, and from levying a tax to provide a sinking fund to pay any part of said issue of \$41,000 of bonds issued and sold, and restraining it from proceeding with the performance of any contract already awarded for the construction of said electric light plant, and that upon the final hearing of said cause that said temporary restraining order be made permanent.

That upon the filing of said petition a temporary restraining order was granted by said Court restraining this defendant as prayed for in said petition; that upon the final hearing of said cause in said Court of Common Pleas said temporary restraining order was by order of the court dissolved and said petition dismissed and thereupon said the Massillon Electric and Gas Company perfected an appeal to the Court of Appeals of Wayne County, Ohio, being cause No. 638 in said Court, and thereby said temporary restraining order was re-instated and was in full force and effect; that upon the final hearing of said cause

in said Court of Appeals said temporary restraining order [fol. 224] was by the consideration of said Court of Appeals made permanent in all respects and it was by said Court of Appeals adjudged and decreed that this defendant, the Village of Orrville, be permanently restrained from doing and performing all and singular the acts and things as prayed for by said the Massillon Electric and Gas Company in its said petition. A copy of the judgment and order of said Court of Appeals as entered upon the records of said court is hereto attached, marked "Exhibit C" and made a part hereof. A copy of the opinion of said Court of Appeals in said cause is hereto attached, marked "Exhibit D."

Further answering this defendant says that said judgment, order and decree of said Court of Appeals in said cause No. 637 and said judgment, order and decree in cause No. 638 is still in full force and effect.

That plaintiff was by this defendant notified of the filing of said petition, the contents thereof and the granting of said temporary restraining order before it delivered any material to defendant, and had knowledge of all subsequent proceedings of said cases.

Further answering this defendant says that on the twenty-first day of July, 1913, the Massillon Electric and Gas Company did in fact own and was operating an electric light plant in said Village of Orrville under a franchise duly granted to it, and that said franchise had not then expired and that said the Massillon Electric and Gas Company was then supplying from said plant electricity to the Village of Orrville, and the inhabitants thereof for lighting and power purposes, both public and private; that [fol. 225] no effort to purchase from the said the Massillon Electric and Gas Company its said plant was made by the Village of Orrville or any of its officers on or at any time prior to the seventeenth day of November, 1912; that by reason thereof and because of the provisions of Section 3990 of the General Code of Ohio, this defendant, the Village of Orrville, was without power or authority to construct a municipal electric light plant. That said \$41,000 bond issue was advertised for sale without having been offered to the State Liability Board of Awards.

Further answering this defendant says that said resolution passed by the Village of Orrville on said twenty-first day of July, 1912, and said ordinance passed by said Village of Orrville on the seventeenth day of November, 1912, providing for the issuance of bonds were published in but one paper, to wit, The Orrville Courier-Crescent, and no further notice or publication of the passage of said resolution or said ordinance was given; that no notice of the passage of said resolution and said ordinance was given as required by law and therefore the same did not become effective, and this defendant, the Village of Orrville, acquired no jurisdiction to proceed further with the construction of its proposed municipal electric light plant.

By reason of all of which and the premises this defendant, the Village of Orrville, proceeded without authority in law, and said contract set forth in plaintiff's petition is null and void, and this defendant is without power or authority to comply with the terms thereof.

Wherefore defendant prays that plaintiff's petition may [fol. 226] be dismissed and for such other and further relief as it may be entitled to.

Clyde Merchant and G. A. Starn, Attorneys for Defendant.

(Duly verified.)

**Exhibit A to Answer**

The State of Ohio,  
Wayne County, etc:

In the Court of Appeals

No. 637

The Massillon Electric and Gas Company, Plaintiff,  
vs.

The Village of Orrville et al., Defendants

This twenty-fifth day of September, 1914, this cause came on for hearing on the pleadings, the evidence and the arguments of counsel, and was submitted to the court; an oral

objection, whereof the court do find, on the issues joined, for the plaintiff and that the plaintiff is entitled to the relief prayed for.

It is therefore, on motion of the plaintiff, adjourned and directed that the preliminary injunction injunction granted in this action be, and the same hereby is, made permanent.

It is further commanded that the said plaintiff recover from the said defendants respectively the costs having accrued, taxed at \$—. It is further ordered that any motion for a new trial hearing, if filed by any defendant herein, will be overruled. And this cause be remanded to Court of Common Pleas for execution. To all of which hearing, judgment and costs the said defendants except.

Endorse: "Approved." R. S. Shultz, S. C. Powell,  
Judge Court of Appeals.

"Cause No. 19" to Appellate.

Opinion.

By the Court:

These few words are in this cause by appeal from the judgment of the Court of Common Pleas. The plaintiff is with one being the appellant.

In case No. 19, the plaintiff filed its petition alleging that it was the owner of an electric light plant in the Village of Oneonta, this county, and that the defendant, the Village of Oneonta, by its duly elected officers, was about to erect a similar light plant in said village; that certain preliminary injunction had been had by the court of said village authorizing the plaintiff and wife of plaintiff and otherwise prohibiting to defendant and others an electric light plant in said village. A temporary injunction was allowed in the Court of Common Pleas where the same was found upon their merits resulting in a dismissal of the plaintiff by said court.

The judgment of this court, which is in favor of the plaintiff as well as said petition, is based upon two main grounds: First, that the provision of Section 3866 of C. L. & J. be full, true and certain, not having been ascertained by

the adoption of the amendments to the constitution, and that the provisions of this section providing for the sale [fol. 228] of an electric light plant in villages to the municipality have not been complied with. And, second, that the facts upon which the said Village of Orrville would have the right to exercise the jurisdiction claimed do not appear by the record.

It is contended on the part of the defendants that the provisions of Section 3990 of the G. C. which require that council of a municipality intending to erect a municipal electric light plant at the expense of the corporation, or purchase any electric light works already erected by any person, company or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, "the council shall, with the consent of the owner or owners, purchase such gas works or electric works already erected therein," "and that if the council and owner or owners of said electric works can not agree upon the compensation to be paid therefor, the council may file in the Probate Court of the county where said electric works are located, a petition to appropriate such gas works or electric works, and thereupon the same proceedings shall be had of appropriation as is provided for the appropriation of private property by a municipal corporation, were repealed by the adoption of the recent amendment to the constitution."

The petition in case No. 638 contains the necessary averment, that the plaintiff is the owner of said electric light works in the Village of Orrville under a franchise granted by said village. No defense is made that the franchise has terminated. But it is claimed that the provisions of Section 3990, above quoted, are in conflict with the provisions [fol. 229] of the amended constitution relating to municipalities, and especially in conflict with Section 5, Article 18 of the constitution as amended.

We are of the opinion that there is no conflict between Section 5 of Article 18, nor with any other section of said Article 18, and the said Section 3990 that this section of the statutes is in full force and effect; and that the defendant the Village of Orrville, having failed to either purchase or condemn the property of the plaintiff, its action is without

authority of law and the injunction allowed should be made perpetual.

The second ground upon which the court is authorized to render judgment for plaintiff is, that the ordinances of the Village of Orrville providing for the issuing of bonds and the sale of the same, were not passed as required by law. We think that these ordinances are ordinances of a general nature and provide for public improvements and that therefore they come within the provisions of Section 4227, which provides, among other things: "Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation. We think this provision is jurisdictional. That when the council fails to pass such ordinances in the manner prescribed by the statutes it is without jurisdiction to proceed further with the matter in hand, in this case, the erection of an electric light plant for the Village of Orrville. It is provided by Section 4228:

"Ordinances and resolutions requiring publication shall be published in two newspapers of opposite polities, published and of general circulation in said municipality, if such there be."

[fol. 230] And it is further provided by Section 4229:

"Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite polities, of general circulation therein, if there are such in the municipality."

It will be noticed that these provisions are mandatory. Therefore they must be strictly complied with in order to give the council jurisdiction to proceed in the construction of an electric light plant.

It appears by the record that the ordinances of said village and resolutions when published were published in but one newspaper, The Orrville Courier-Crescent, and not in two newspapers as required by these statutes. It does not appear what the polities of the Orrville Courier Cres-

cent is, whether Democrat, Republican or of some other political affiliation.

It is a well settled rule in Ohio that inferior tribunals must comply strictly with the statutes giving jurisdiction until such jurisdiction has been acquired. Perhaps there are many things that may be done after jurisdiction attaches that are not in strict compliance with statutory provisions, but every statutory provision that relates to jurisdiction or the right of the corporation to act must be strictly conformed to. There are but two methods of publication of ordinances of a general nature and providing for improvements mentioned and provided for in the [fol. 231] statutes. They are, first, by the provisions of Section 4229, by publication in two newspapers of opposite polities of general circulation in said municipality if there are such, and if there are none such, and no newspaper published in said municipality the notice may be given by posting copies thereof at not less than five of the most public places in the corporation for a period of not less than 15 days.

It may be contended that because this provision only applies to municipalities where no newspaper is published that by implication publication could be had in one newspaper where such paper was published in the municipality. We do not think that where the matter is jurisdictional anything of the kind can be implied, and that no other publication than one of the two methods mentioned is a compliance with the requirement of the statute.

This has been held by other courts in the state and was held by this court to be the law in an action before it for the improvement of a public street in one of the villages of Muskingum County, Ohio.

For the two reasons mentioned the judgment will be rendered in favor of the plaintiff in each of said cases, Nos. 637 and 638. In case No. 638 the action was by the same plaintiff as a taxpayer in which it seeks to enjoin the expenditure of the moneys raised by the sale of bonds for the purpose of constructing an electric light plant in said village. This action is authorized by law to be brought by a taxpayer in certain cases. The averment of this petition brings the action within the statutory provision per [fol. 232] mitting such actions to be so brought. We think the testimony sustains the averment of the petition in this

action and that the defendant should be enjoined from proceeding with the erection of such plant. It should be sustained on account of the invalidity of the proceedings of the council, both in the passage and the publication of the ordinances set out and described in the petition, and because the provisions of the statutes relating to the construction of such improvements had not been complied with.

If motions for a new trial are filed in either or both of said cases they will be overruled. Exceptions may be noted, and each of said cases will be remanded to the Court of Common Pleas for execution.

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“EXHIBIT C” TO ANSWER

This twenty-fifth day of September, 1914, this cause came on for hearing on the pleadings, the evidence and the arguments of counsel, and was submitted to the court; on consideration whereof the court do find, on the issue joined, for the plaintiff and that the plaintiff is entitled to the relief prayed for.

It is therefore, on motion of the plaintiff, adjudged and decreed that the preliminary injunction heretofore granted in this action be, and the same hereby is, made perpetual.

It is further considered that the said plaintiff recover [fol. 233] from the said defendants respectively its costs herein expended, taxed at \$—. It is further offered that any motion for a new trial herein, if filed by any defendant herein will be overruled. And this cause is remanded to Court of Common Pleas for execution. To all of which finding, judgment and order the said defendants except.

Endorse-: “Approved.” R. S. Shields, L. K. Powell,  
Judges Court of Appeals.

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[fol. 234] IN COURT OF COMMON PLEAS OF WAYNE COUNTY

REPLY—Filed January 18, 1915

And now comes the plaintiff herein and for reply to the answer of defendant, the Village of Orrville, says that on or about the thirteenth day of January, the board of trustees

of public affairs duly advertised for bids for furnishing the machinery and material set out in plaintiff's petition. That thereupon this plaintiff upon inquiry ascertained that the money required for the said contract was in the treasury of the said village to the credit of the electric light fund, and was not appropriated for any other purpose. And it thereupon duly made its bid, which was duly accepted and the said contract set out in plaintiff's petition was duly executed. And this plaintiff had no knowledge of any of the proceedings of said council prior to the said advertisement of said bids. And for want of such knowledge denies any want of authority on the part of the Village of Orrville to construct said electric light plant, or that any of the proceedings antecedent to the advertisement of said bids were illegal or void. This plaintiff further says that it was not a party to said proceedings in the Court of Common Pleas, or in the Court of Appeals, and was in nowise affected by said judgments. This plaintiff denies that it had any knowledge or notice of the pendency of said suits, or the judgment therein prior to the execution of said contract and the giving bond for the execution thereof. And this plaintiff denies that the Village of Orrville was not authorized to construct said electric light plant, or that the proceedings for the construction of said municipal and said electric light plant were illegal and [fol. 235] void.

This plaintiff further says that said Section 3990 of the General Code of Ohio is unconstitutional and void because the same is in conflict with Article 18 of the Constitution of the State of Ohio, and for the further reason that the same was repealed and annulled by the general schedule attached to the amendments to the Constitution adopted September, 1912.

Wherefore, having fully answered, it prays judgment as in its petition.

Rogers, Mather & Nesbitt and Taggart, Weygandt & Ross, Attorneys for Plaintiff.

(Duly verified.)

## IN COURT OF COMMON PLEAS OF WAYNE COUNTY

## MOTION FOR NEW TRIAL—Filed January 19, 1915

And now comes the plaintiff herein and moves the court to set aside the finding and judgment of the court heretofore made herein, and grant a new trial herein for the following reasons, to wit:

First. Said judgment and finding is contrary to agreed statements of fact filed herein.

Second. Said judgment is contrary to law.

Third. Said finding and judgment is not sustained by sufficient evidence and is contrary to law.

Fourth. Said judgment was given for said defendant when it should have been given for said plaintiff.

Other errors apparent on the record to which the plaintiff *excepted* at the time.

[fol. 236] Rogers, Mather & Nesbitt and Taggart, Weygandt & Ross, Attorneys for Plaintiff.

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[fol. 237] IN COURT OF COMMON PLEAS OF WAYNE COUNTY

## Bill of Exceptions—Filed January 19, 1915

## CAPTION

Be it remembered that at the trial of the above entitled cause on the nineteenth day of January, 1915, being a day in the October Term, 1914, of the Court of Common Pleas within and for said county of Wayne, before the Honorable L. R. Critchfield, Jr., judge presiding, a jury being waived by the parties, the following agreed statement of facts was submitted by the parties hereto as maintaining the issues involved herein and being all the testimony introduced in said cause.

## AGREED STATEMENT OF FACTS

It is hereby agreed by and between plaintiff and defendant that a jury be waived in this case, and that the same be submitted to the court for a decision upon the following agreed statement of facts so far as the same are material and competent.

1. That on July 21, 1913, the defendant by its council, passed a resolution declaring it necessary to issue bonds of the Village of Orrville in the sum of \$41,000 for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances necessary or desirable for the operation of an electric lighting, heating and power plant in said village; that said resolution, among other things, provided that the question of issuing bonds in the sum of \$41,000 be submitted to the voters of said village on the twenty-sixth day of August, 1913; that said resolution was published in the Orrville Courier-Crescent [fol. 238] for two consecutive weeks, the first publication being on July 25, 1913. No other notice of the passage of said resolution was given; that in accordance with said resolution a notice of said election was published in the Orrville Courier-Crescent once a week for four consecutive weeks, the first publication being July 25, 1913; that on the twenty-sixth day of August, 1913, an election was held in said village on said question of the issuance of \$41,000 of bonds, and that said proposition carried by an affirmative vote of more than two-thirds of the votes cast at said election, the affirmative vote being 624 and the negative vote being 59. That the total vote cast for governor in said village in 1912 was —.

2. That on the seventeenth day of November, 1913, this defendant by its council passed an ordinance providing for the issuance of said bonds for the purposes and in the amount set forth in said resolution of July 21, 1913; that said ordinance was published in the Orrville Courier-Crescent for two consecutive weeks, the first publication being on November 21, 1913, and no other notice of the passage of said ordinance was given; that in pursuance of the provisions of said ordinance notice of the sale of said \$41,000 bond issue was given by publication in the Orrville Courier-Crescent, and in the Wooster Daily Republican, by publica-

tion for four consecutive weeks, the first publication being on November 21, 1913; that on December 24, 1913, bids were received for the sale of said bonds and the same were awarded to the Mellon National Bank of Pittsburgh, Pa., at a premium of \$795, and on the third day of February, 1914, said bonds were delivered to said bank and the money therefor received by the Village of Orrville.

[fol. 239] 3. That the Board of Trustees of Public Affairs duly advertised for bids and proposals for the furnishing of machinery and material for the construction of said electric lighting plant, in the Orrville Courier-Crescent for two consecutive weeks, the first publication being on January 13, 1914, and that plaintiff submitted a bid to furnish one Horizontal Engine, Corliss Non-releasing Type, erected ready for operation, which bid of the plaintiff was by the defendant accepted, and on the fifteenth day of February, 1914, a contract was entered into between said board of trustees of public affairs and the plaintiff, and that the copy attached to plaintiff's petition marked "Exhibit A" is a true copy of said contract; that the defendant as agreed by the terms of said contract, was to pay plaintiff the sum of \$2,580; that plaintiff executed and delivered to defendant a good and sufficient bond to the acceptance of the defendant as required by said contract.

4. That in accordance with said contract plaintiff delivered to the defendant, the Village of Orrville, on the twentieth day of July, 1914, machinery and material mentioned in said contract and performed all of the other obligations on its part to be performed by said contract; that there is due the plaintiff from the defendant the sum of \$1,313.34 upon its said contract, which the defendant is ready and willing to pay but for the fact that it is restrained from so doing by reason of the restraining order and injunction mentioned in the answer and hereafter in these findings of facts.

5. That on July 21, 1913, and prior thereto and at all times since said date The Massillon Electric & Gas Company, an Ohio corporation, owned an electric lighting plant [fol. 240] in said Village of Orrville and was furnishing electricity to said village and the inhabitants thereof for both public and private lighting under a franchise granted

by said village in 1892, and that said franchise has not yet expired.

6. That on the sixth day of October, 1913, the mayor of the Village of Orrville was authorized by the council of said village, and did write a letter to the said The Massillon Electric & Gas Company, in which letter it was stated that by the votes of the people of Orrville at its special election it was shown that the people desired a municipal light plant and that said the Massillon Electric & Gas Company were asked in said letter to submit a plan or plans, whereby the village might take over the property of said light company. Other correspondence was had between the mayor of said village and said light company but none of the other correspondence other than said letter of October 6 was authorized by the council of said village; all of such subsequent correspondence was in regard to the same subject, and the result of the writing of the letter of October 6; that on other effort to purchase from the said The Massillon Electric & Gas Company its said plant was made by the Village of Orrville or any of its officers.

7. That on the twelfth day of March, 1914, the Massillon Electric & Gas Company filed its petition in the Court of Common Pleas of Wayne County, Ohio, against this defendant, the Village of Orrville, and others, being cause No. 24440, and on the third day of April, 1914, said The Massillon Electric & Gas Company as a taxpayer, on behalf of the Village of Orrville, commenced an action against this defendant and others, being cause No. 24458 in the Court of [fol. 241] Common Pleas of Wayne county, Ohio, and it was alleged in said petition, among other things, such matters as are set forth in the defendant's answer herein, in regard thereto; that upon the filing of each of said petitions as aforesaid, a temporary restraining order was granted by the court restraining this defendant as alleged in its answer herein.

That upon the final hearing of said actions in the Court of Common Pleas of Wayne county, to wit, May 21, 1914, said temporary restraining orders were dissolved and the petitions dismissed; that on the twenty-sixth day of May, 1914, said The Massillon Electric & Gas Company filed appeal bonds in each of said cases and thereby perfected an

appeal to the Court of Appeals of each of said cases; that on the twenty-fifth day of September, 1914, upon final hearing of said causes in the Court of Appeals said temporary restraining orders were made permanent in all respects as originally granted.

8. That on the twenty-sixth day of May, 1914, there was paid by the defendant to the plaintiff on their said contract the sum of \$1,290, and that no other payments have been made thereon; that plaintiff's expense incurred in hauling charges, for conveying said machinery and material from the car to said plant in Orrville was \$23.34.

9. That on the — day of March, 1914, the clerk of the Board of Public Affairs by letter notified plaintiff of the filing of the petitions of The Massillon Electric & Gas Company in the Court of Common Pleas of Wayne county and of the granting of the temporary restraining orders, restraining this defendant from proceeding with the construction of its light plant.

[fol. 242] 10. That on the tenth day of February, 1914, the clerk of the Village of Orrville duly certified to the council and to the board of trustees of public affairs of said village that the money required for said contract between plaintiff and defendant was in the treasury to the credit of the electric light fund, and was not appropriated for any other purpose.

11. That the judgment, order and decree of said Court of Appeals making said temporary restraining order permanent is still in full force and effect and no proceedings have been instituted to reverse or vacate the same.

12. That there is but one newspaper published in the Village of Orrville, to wit, the Orrville Courier-Crescent, and that said paper is independent in politics.

13. That said \$41,000 bond issue was not offered to the State Liability Board of Awards prior to being advertised for sale, but that after the sale of said bonds the said State Liability Board of Awards stated in writing that if said bonds had been offered to it that they would have been refused.

14. That the allegations contained in the petition which are admitted by the answer to be true, are also made a part of this agreed statement of facts.

15. That plaintiff was not a party in any manner to the suits brought in the Court of Common Pleas by the Massillon Electric & Gas Company, or in said case in the Court of Appeals of said county.

16. That on or before May 21 the plaintiff was notified by defendant that the temporary restraining order theretofore granted was dissolved and it was instructed to proceed with its contract.

Rogers, Mather & Nesbitt and Taggart, Weygandt & Ross, Attorneys for Plaintiff. Clyde Merchant and G. A. Starn, Attorneys for Defendant.

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#### MINUTE ENTRIES

The foregoing agreed statement of facts was and is all the testimony and evidence offered by either party on the trial of this cause.

And the court having found for the defendant and against the plaintiff and entered a judgment as appears on record in this cause.

Thereupon the plaintiff gave notice of filing a motion for new trial to be filed in this cause, and thereupon, within three days after the rendition of said judgment, the plaintiff filed its motion for a new trial and to set aside the findings and judgment for the reason set forth in said motion.

That afterwards, to wit, on the nineteenth day of January, 1915, said motion of said defendant for a new trial was argued by counsel and submitted to the court, which motion for a new trial by the plaintiff, the court upon consideration thereof on the nineteenth day of January, 1915, overruled, and to the findings of the court and the rendering of the judgment for the defendant and against the plaintiff and to the overruling of the court of the motion for a new trial, the plaintiff at the time then and there excepted, as appears on record in this cause. To all of which [fol. 244] rulings, findings and judgments and the order of said court the plaintiff at the time then and there excepted

and gave notice of its intention of filing a petition in error in this cause in the Court of Appeals of Wayne County, Ohio.

And thereupon said plaintiff, who at the time excepted to the rulings of said court, on the twentieth day of January, 1915, reduced its exceptions to writing and on the twentieth day of January, 1915, and within forty days of the date of the judgment of said court and the overruling of said motion for a new trial, filed the same with the clerk of the Court of Common Pleas of Wayne county, Ohio.

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#### ORDER SETTLING BILL OF EXCEPTIONS

And thereupon the clerk of said court upon the filing of said bill of exceptions forthwith gave notice to the adverse party or its attorneys and said adverse party within ten days after said notice filed objections or amendments thereto and said clerk thereupon transmitted said bill of exceptions, objections and amendments to the trial judge and said bill of exceptions, objections and amendments was on the twentieth day of January, 1915, corrected, allowed and signed as a true bill of exceptions.

And thereupon on the twentieth day of January, 1915, said trial judge transmitted the same to the office of the clerk of said court and ordered the same to be filed and made a part of the record in this cause but not spread at length upon the journal.

L. R. Critchfield, Judge of the Court of Common Pleas and Trial Judge in this Case.

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[fol. 245]                    IN SUPREME COURT OF OHIO

#### EXHIBIT IN EVIDENCE

Volume 1 of the Ordinance Record, Pages 32 to 36

An ordinance Providing for Electric Lights, Heat, and Motive Power in the Village of Orrville, Wayne County, Ohio

Be it ordained by the Council of the Village of Orrville and it is hereby ordained:

Section 1. That Aurel P. Gans and Melville D. Wilson, of Canal Dover, Ohio, their associates, successors and assignees are hereby authorized and empowered to use the streets, lanes, alleys and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating Electric Light wire mains and apparatus complete for the distribution of Electricity for light, heat and power.

Section 2. Said Gans and Wilson in the construction of their plant or in conducting their wires for the distribution of electric current shall not unnecessarily intercept or obstruct the passage of any street, alley, lane or avenue or other thoroughfare in said Village, crossing same shall not unnecessarily mutilate, cut or trim any tree or trees except for the same conduct of said electric wire and same shall be fully protected from any and all damages where such trimming is necessary to be done. Same shall erect said wires on poles not less than thirty feet long and placed in the ground at a sufficient depth to insure perfect safety.

Section 3. In consideration of the privileges hereby granted the said Gans and Wilson, their associates, successors and assigns shall furnish the Village of Orrville on the several streets, lanes, alleys and avenues not less than twenty-five (25) electric lamps of not less than 2,000 candle power each, to be placed wherever the Council may direct in said Village of Orrville, said lamps to burn and be lighted [fol. 246] and extinguished according to what is known as "The Moon-light Schedule," until 1 o'clock, and in addition then to be lighted whenever the moon is obscure, and on rainy and stormy nights whenever same occurs outside the regular lighting hours.

Section 4. In consideration of the construction of said electric light plant as herein provided, the Council of said Village of Orrville hereby agrees and binds itself to take and use the light of said Gans and Wilson, their associates successors and assigns for the period of ten (10) years from and after the date upon which said light shall be first supplied and to pay same quarter annually for said lighting, a price equal to seventy-two (\$72) dollars per year for each and every lamp of 2,000 candle power, said lamps to be lighted and extinguished and kept in repair by and at the

expense of said Gans and Wilson, their associates, successors and assigns; the total number of lamps thus supplied to be not less than twenty-five 2,000 candle power lamps-Are light.

Section 5. Said Gans and Wilson shall commence work on said electric light plant after the passage of this ordinance at such time as to have same completed by May 1, 1892, otherwise the ordinance will be null and void, the privilege and franchise hereby granted shall be declared forfeited and the obligations of the Village annulled.

Section 6. The privilege hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of said Gans and Wilson to perform any of the conditions hereby imposed where such failures are occasioned by accident, untoward events or the want of necessary repairs to the machinery or apparatus of said electric light plant, provided such accidents be remedied [fol. 247] and repairs made within a reasonable time and a pro rata reduction be made to the said Village of Orrville for any loss of lighting occasioned thereby.

Section 7. Said Gans and Wilson agree to accept this ordinance and to notify the council in writing of such acceptance within ten days from the passage hereof, which acceptance together with the ordinance shall constitute a contract, otherwise the Village shall be no longer bound thereby and said ordinance shall be void.

Section 8. All other ordinances heretofore passed pertaining to and providing for electric lights, heat and motive power by means of electricity and all ordinances granting franchise for the erection and operation of electric wire mains for the distribution of light, heat and motive power are hereby repealed.

Passed and adopted February 1, 1892.

M. R. Zell, Clerk.

A. N. Brenneman, O. D. Braden, J. W. Stansbury, Ordinance Committee.

Passed and adopted February 1st, 1892. M. R. Zell, Clerk. (The same as printed and pasted on page 32.)

[fol. 248] Volume 2 of the Council Record, Pages 170 to 173

Orrville, Ohio, February 1, 1892.

Council called to order at 7 P. M., Mayor Barrett presiding.

Members present: Stansbury, Braden, Robinson, Postwait, Brenneman.

Minutes of last meeting were read and approved.

The committee to whom was referred the matter of lighting the corporation by an electric light plant reported that they had visited Canal Dover and had seen the plant located there and had made the necessary inquiries of parties interested as to the quality of light furnished by said plant who represented it as giving good satisfaction.

Moved and seconded to accept said committee's report.

#### Electric Light Ordinance

An ordinance providing for electric lights, heat and motive power in the Village of Orrville, Wayne County, Ohio, was presented by the ordinance committee.

Moved and seconded that the above named ordinance be accepted and passed to its first reading.

The Mayor ordered the vote called, resulting in Ayes, Stansbury, Robinson, Braden, Postwait and Brenneman; Nays, None.

[fol. 249] Moved and seconded that the rules be suspended from reading ordinance on three different days and that the ordinance just read be passed to its second reading.

They ordered the vote called, resulting in Ayes, Stansbury, Braden, Robinson, Postwaite, Brenneman; Nays, none.

The Mayor declared the motion carried. That the rules be suspended from reading, moved and seconded, ordinance on three different days and that the ordinance just read be passed to its third reading.

The Mayor ordered the vote to be called on said motion, resulting in Ayes, Stansbury, Braden, Robinson, Postwait, Brenneman. Nays, none. The Mayor declared the motion carried.

Moved and seconded that the ordinance just read be adopted as read. The Mayor ordered the vote called on

said motion, resulting in Ayes, Stansbury, Robinson, Braden, Postwait, Bremmen. Nays, none. The motion was declared carried by the Mayor.

[fol. 250] Volume 1 of the Ordinance Record, Page 42

**Ordinance for Repeal of Section 5**

Repeal of section (5) five of ordinance providing for electric lights, heat and motive power in the village of Orrville, Wayne County, Ohio. Passed and adopted February 1, 1892, to read as follows:

Section 5. Said Gans and Wilson shall commence work on such electric light plant after the passage of this ordinance, at such time as to have same completed by June 1, 1892; otherwise the ordinance will be null and void, the privilege and franchise hereby granted shall be declared forfeited and the obligations of the village annulled.

N. L. Royer, Mayor. H. S. Wertz, Clerk.

J. W. Stansbury, O. D. Braden, D. G. Blackwood, Ordinance Committee.

(Same as printed and pasted on Page 42.)

Volume 2 of the Council Record, Page- 191 to 192

**Minutes of Meeting Held April 18th, 1892**

Council met pursuant to adjournment at 7:30 P. M., Mayor Royer presiding.

Present: Stansbury, Braden, Bawman, Blackwood, Brememan, Shunk.

Minutes of last meeting read and approved.

**Committee on Ordinance**

The following was presented by the Ordinance Committee, J. W. Stansbury, O. D. Braden and D. G. Blackwood:

Repeal of Section five or ordinance providing for electric lights, heat and motive power in the Village of Orrville, Wayne County, Ohio. Passed and adopted February 1st, 1892, to read as follows:

Section 5. Said Gans and Wilson shall commence work on said electric light plant after the passage of the ordinance at such time as to have same completed by June 1st, 1892, otherwise the ordinance will be null and void, the privilege and franchise hereby granted shall be declared forfeited and the obligations of the village annulled.

It was moved and seconded that the ordinance just read be received and passed to its first reading. Ayes and Nays called, resulting in, Ayes: Stansbury, Braden, Bawman, Blackwood, Brenneman and Shunk.

The Committee was instructed to read the ordinance.

Moved and seconded ordinance just read, rules be suspended, Ayes: Stansbury, Braden, Bawman, Blackwood, Brenneman and Shunk. Nays: None.

It was moved and seconded ordinance just read rules be suspended. Ayes: Stansbury, Braden, Bawman, Blackwood, Brenneman and Shunk. Nays: None.

The Ordinance was read again. It was moved and seconded that the ordinance be adopted as just read. Ayes: Stansbury, Braden, Bawman, Blackwood, Benneman and Shunk. Nays: None.

[fol. 252] Volume 2 of the Council Record, Page- 191 and  
192

#### Minutes of Meeting Held April 18th, 1892

Council met pursuant to adjournment at 7:30 P. M., Mayor Royer presiding.

Present: Stansbury, Braden, Bawman, Blackwood, Brenneman, Shunk.

Minutes of last meeting read and approved.

#### Committee on Ordinance

The following was presented by the ordinance committee, J. W. Stansbury, O. D. Braden, D. G. Blackwood:

#### Ordinance

Repeal of Section five or ordinance providing for electric lights heat and motive power in the Village of Orrville, Wayne County, Ohio. Passed and adopted February 18th, 1892, to read as follows:

Section 5. Said Gans and Wilson shall commence work on said electric light plant after the passage of this ordinance at such time as to have same completed by June 1st, 1892, otherwise the ordinance will be null and void the privilege and franchise hereby granted shall be declared forfeited and the obligations of the Village annulled.

It was moved and seconded that the ordinance just read be received and passed to its first reading. Ayes and nays called, resulting in Ayes: Stansbury, Braden, Bawmen, Brenneman and Shunk.

The committee was instructed to read the ordinance.

Moved and seconded ordinance just read, rules be suspended. Ayes: Stansbury, Braden, Bawman, Blackwood, Brenneman and Shunk. Nays: None.

[fol. 253] It was moved and seconded ordinance just read rules be suspended and passed to its third reading. Ayes: Stansbury, Braden, Bawman, Blackwood, Brenneman, and Shunk. Nays: None.

The ordinance was read again. It was moved and seconded that the ordinance be adopted as just read. Ayes: Stansbury, Braden, Bawman, Blackwood, Brenneman, and Shunk. Nays: None.

[fol. 254] Volume 1 of the Ordinance Record, Page- 225 to 229

#### Ordinance Providing for Lighting Streets and Alleys

Be it ordained by the Council of the Village of Orrville, Ohio, and it is hereby ordained:

Section 1. That in accordance with the proposition submitted to the Council of the Village of Orrville, Ohio, by the Orrville Light, Heat and Power Company, and in consideration the said village of Orrville perform the conditions hereinafter set forth in this ordinance, in Section 2 thereof. The Orrville Light, Heat and Power Company shall furnish the Village of Orrville for a period of five (5) years from the 15th day of July 1902 on the several streets, lanes, alleys and avenues of said Village not less than thirty (30) electric lamps (Are Lights) of not less than two thousand (2,000) candle power each, and as many

more of like power and quality additional as the Council of said Village within the said period of five (5) years may from time to time direct, any such additional lamps to those now in use in said Village, to be placed wherever the council may direct within the limits of said Village, said lamps when so placed to continue in use until the end of said period of five (5) years from the date this ordinance goes into effect, and all of said lamps to burn and be lighted and extinguished according to what is known as the moonlight schedule until eleven thirty (11:30) o'clock and in addition thereto to be lighted whenever the moon is obscure and on rainy and stormy nights whenever the same occurs outside the regular lighting hours, and said lamps shall be placed, lighted, extinguished and kept in repair by and at the expense of the said The Orrville Light, Heat and Power Company.

[fol. 255] Section 2. The Village of Orrville by it common council agrees in consideration of the faithful performance by the Orrville Light, Heat and Power Company of the conditions set forth in Section 1 of this ordinance to be by it performed to pay the said The Orrville Light, Heat and Power Company a price equal to fifty three (\$53.00) Dollars per year for a period of five (5) years from the date that this Ordinance shall go into effect the same to be paid monthly for each and every 2,000 candle power lamp (Arc-light) the total number of said lamps to be not less than thirty (30) for the full period of five (5) years and as many more as the Council may from time to time direct said company to place, the said additional lamps so placed to continue in use from the time they are so placed until the end of the period aforesaid.

Section 3. The privileges hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of the said The Orrville Light, Heat and Power Company to perform any of the conditions hereby imposed where such failures are occasioned by accident, untoward events or the want of necessary repairs to the machinery or apparatus of said electric light plant provided such accidents be remedied and repairs made within a reasonable time and a pro rata reduction be made to the said Village of Orrville for any loss of lighting occasioned thereby.

Section 4. Said the Orrville Light, Heat and Power Company shall furnish light for full commercial lighting in said Village to the citizens thereof at a price not to exceed seven and one-half cents per Kilowatt-hour, meter rate.

[fol. 256] Section 5. Said Orrville Light, Heat and Power Company shall accept this ordinance and notify the Council in writing of such acceptance within ten (10) days from the passage thereof which acceptance together with the ordinance shall constitute a contract otherwise the Village shall be no longer bound thereby and this ordinance shall be void.

Section 6. This ordinance shall take effect and be in force from and after its passage, acceptance and legal publication.

Passed June 16, 1902.

William Faber, Mayor. C. F. Craft, Clerk.

(The same as above, printed and passed on page 228.)

[fol. 257] Volume 3 of the Council Record, Page 318

#### Minutes of the Meeting Held June 16, 1902

Council met in regular session in council chamber. Mayor Faber in the chair. Members present: Solicitor Orr, Councilmen, Strauss, King, Tanner, Griffith and Ohl. Absent: Gillam.

Minutes of the last meeting read and approved.

Petition signed by A. I. Yeakley, E. G. Cook, George L. Peters, and seventeen others, property owners on Walnut Street, asking Council to specify a width of 20 feet in the improvement of said street was read and by motion was accepted and placed on file.

Ayes: Strauss, King, Tanner and Griffith.

Nays: None.

Motion carried.

Ordinance providing for lighting the streets and alleys of Orrville, Ohio, and fixing the rates for commercial lighting read.

Moved and seconded that the lighting Ordinance be passed to its first reading.

Ayes: Strauss, King, Tanner, Griffith and Ohl.

Nays: None.

Motion carried.

Ordinance read.

Moved and seconded that the rules be suspended and the above ordinance be passed to its second reading.

Ayes: Strauss, King, Tanner, Griffith and Ohl.

Nays: None.

Motion carried.

[fol. 258] Ordinance read.

Moved and seconded that the rules be suspended and the above ordinance be passed to its third reading.

Ayes: Strauss, King, Tanner, Griffith and Ohl.

Nays: None.

Motion carried.

Ordinance read.

Moved and seconded that the ordinance providing for the lighting of our streets and alleys just read be adopted as read.

Ayes: Strauss, King, Tanner, Griffith and Ohl.

Nays: None.

Motion carried.

Motion to adjourn carried.

William Faber, Mayor. C. F. Craft, Clerk.

[fol. 259] Volume 3 of the Ordinance Record, Page 122 to 126

An Ordinance Providing for Lighting the Streets and Alleys of the Village of Orrville, Ohio, and Fixing the Rates for Commercial Lighting.

Be it ordained by the Council of the Village of Orrville, Ohio:

Section 1. That in accordance with the proposition submitted to the Council of the Village of Orrville, Ohio by The Orrville Light, Heat and Power Company and in consideration that the Village of Orrville perform the conditions hereinafter set forth in this ordinance in Section 2 thereof, The Orrville Light, Heat and Power Company shall furnish the Village of Orrville for a period of five years from the 15th day of July, 1907, on the several

street, avenues and alleys of said Village, not less than thirty-two (32) new electric lamps (are lights) of not less than 2,000 candle power each, and as many more of like power and quality additional as the Council of said Village within the said period of five years, may from time to time direct, any such addition lamps to those now in use in said Village to be placed wherever the council may direct within the limits of said village, said lamps when so placed to continue in use until the end of said period of five years from the date this ordinance goes into effect, and all of said lamps to burn all night and each and every night in the year, and said lamps shall be placed, lighted extinguished and kept in repair by and at the expense of the said The Orrville Light, Heat and Power Company.

[fol. 260] The said The Orrville Light, Heat and Power Company shall also place and keep in repair at their expense, in the streets of said Village at places to be designated by the Council not less than three red lights of the same candle power as those used at Wooster, Ohio, for the same purpose to be operated from the Telephone Exchange and used for police purposes, the same to be furnished free of any charge.

Section 2. The Village of Orrville by its council agrees in consideration of the faithful performance by The Orrville Light, Heat and Power Company, of the conditions set forth in Section 1 of this ordinance to be by it performed, to pay the said The Orrville Light, Heat and Power Company for the said lights as follows: A price equal to Seventy dollars (\$70) per year for each and every 2,000 candle power lamp (are light), if the total number of lamps does not exceed fifty; a price equal to Sixty-seven (\$67.00) dollars per year for each and every 2,000 candle power lamps (are lights), if the total number exceeds fifty and does not exceed sixty; a price equal to Sixty-four dollars (\$64.00) per year for each and every 2,000 candle power lamps (are lights) if the total of lamps exceeds sixty and does not exceed seventy; a price of Fifty-nine dollars (\$59.00) per year for each and every 2,000 candle power lamp (are light) if the total number of lamps exceeds seventy and does not exceed eighty; a price equal to fifty four dollars (\$54.00) per year for each and every 2,000 candle power lamp (are light) if the total number of lamps

exceeds eighty and does not exceed ninety; a price equal to forty-nine dollars (\$49.00) per year for each and every 2,000 [fol. 26] candle power lamp (are light) if the total number of lamps exceeds ninety, the same to be paid monthly and for a period of five years from the date this ordinance shall go into effect, and the total number of said lamps to be not less than thirty-two (32) for the full period of five years and as many more as the council may from time to time direct said company to place, the said additional lamps so placed to continue in use from the time they are so placed until the end of the period aforesaid.

Section 3. The privileges hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of the said The Orrville Light, Heat and Power Company to perform any of the conditions hereby imposed, where such failures are occasioned by accident untoward events or the want of necessary repairs to the machinery or apparatus of said electric light plant, provided such accidents be remedied and repairs made within a reasonable time and a pro rata reduction to be made to said Village of Orrville for any loss of lighting occasioned thereby.

Section 4. Said The Orrville Light, Heat and Power Company shall furnish light for full commercial lighting in said Village, to the citizens thereof, at a price not to exceed seven and one-half cents per kilowatt hour, meter rate.

Section 5. Said The Orrville Light, Heat and Power Company shall accept this ordinance and notify the Council in writing of such acceptance within ten days from the passage thereof, which acceptance together with this ordinance shall constitute a contract, otherwise the Village of Orrville shall be no longer bound thereby and this ordinance shall be void.

Section 6. This ordinance shall take effect and be in [fol. 262] force from and after the 15th day of July, 1907, and after its acceptance and legal publication.

Passed November 19, 1906.

A. N. Brenneman, President pro Tem. S. W. Jackson, Clerk.

(Same as printed and pasted on Page 122.)

[fol. 263] Volume 4 of the Council Record, Page 245

Minutes of the Meeting Held November 18, 1906

A. N. Brenneman, Chairman pro Tem, presiding.  
All members present.

**Orrville Light, Heat and Power Company Ordinance**

Moved by Kraft and supported by Leickheim that the ordinance providing for lighting the streets and alleys of the Village of Orrville, Ohio, and fixing the rates for commercial lighting for a period of five years from July 15th, 1907, be passed to its first reading.

Ayes: Leickheim, Yeakley, Kraft, Willaman, Eberhart and Brenneman. Nays: None.

Motion carried.

Moved by Willaman and supported by Kraft that the light ordinance be passed to its second reading.

Ayes: Leickheim, Yeakley, Kraft, Eberhart, Willaman and Brenneman. Nays: None.

Motion carried.

Moved by Leickheim and supported by Yeakley that the rules be suspended and the ordinance be passed to its third reading.

Ayes: Leickheim, Yeakley, Kraft, Willaman, Eberhart and Brenneman. Nays: None.

Motion carried.

Moved by Yeakley and supported by Eberhart that the ordinance be adopted as read.

Ayes: Leickheim, Yeakley, Kraft, Eberhart, Willaman and Brenneman. Nays: None.

Motion carried.

[fol. 264] Clerk was instructed by Council to have Ordinance published in the Orrville Crescent.

Motion to adjourn.

G. A. Starn, Mayor. S. W. Jackson, Clerk.

[fol. 265] Volume 4 of the Ordinance Record, Page- 273  
to 276

An Ordinance Providing for Lighting the Streets and  
Alleys of the Village of Orrville, Ohio, and Fixing the  
Rates for Commercial Lighting

Be it ordained by the Council of the Village of Orrville,  
Ohio:

Section 1. That in accordance with the proposition submitted to the Council of the Village of Orrville, Ohio, by D. I. Rennecker and in consideration that the Village of Orrville perform the conditions hereinafter set forth in this ordinance, in Section 2 thereof, D. I. Rennecker shall furnish the Village of Orrville, for a period of five years from the 15th day of July, 1912 on the several streets, avenues and alleys of said village, not less than 32 electric lamps (are lights) of not less than 2,000 candle power each, and as many more of like power and quality additional as the council of said Village within the said period of five years, may from time to time direct; any such additional lamps to those now in use in said village to be placed where ever *cht* Council may direct within the limits of said village, said lamps when so placed to continue in use until the end of said period of five years from the date this ordinance goes into effect and all of said lamps to burn all night and each and every night of the year, and said lamps shall be placed, lighted, extinguished and kept in repair by and at the expense of said D. I. Rennecker.

[fol. 266] The said D. I. Rennecker shall also place and keep in repair at his expense in the streets of said Village at places to be designated by the Council, not less than three red lights of the same candle power as those used at Wooster, Ohio, for the same purpose, to be operated from the telephone exchange and used for police purposes, the same to be furnished free of any charge.

Section 2. The Village of Orrville, by its Council, agrees in consideration of the faithful performance by D. I. Rennecker, of the conditions set forth in Section 1 of this ordinance to be by it performed, to pay the said D. I. Rennecker for the said lights as follows: A price equal to seventy (70) dollars per year for each and every 2,000 candle power lamp

(are light) if the total number of lamps does not exceed fifty; A price equal to sixty seven (67) dollars per year for each and every 2,000 candle power lamp (are light) if the total exceeds fifty and does not exceed sixty; A price equal to sixty-four (64 dollars per year for each and every 2,000 candle power lamp (are light) if the total exceeds sixty and does not exceed seventy; A price of fifty nine (59) dollars per year for each and every 2,000 candle power lamp (are light) if the total exceeds seventy and does not exceed eighty; A price equal to fifty-four (54) dollars per year for each and every 2,000 candle power lamp (are light) if the total exceeds eighty and does not exceed ninety; a price equal to forty-nine (49) dollars per year for each and every 2,000 candle power lamp (are light) if the total exceeds ninety, the same to be paid monthly and for a period of five years from the date this ordinance shall go [fol. 267] into effect, and the total number of lamps to be not less than thirty-two (32) for the full period of five years and as many more as the Council may from time to time direct said D. I. Rennecker to place; the said additional lamps so placed to continue in use from the time they are so placed until the end of the period aforesaid.

**Section 3.** The privileges hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of the said D. I. Rennecker, to perform any of the conditions hereby imposed, where such failures are occasioned by accident, untoward events or the want of necessary repairs to the machinery or apparatus of said electric light plant, provided such accidents be remedied and repairs made within a reasonable time and a pro rata reduction to be made to said Village of Orrville for any loss of lighting occasioned thereby.

**Section 4.** Said D. I. Rennecker shall furnish light for full commercial lighting in said village, to the citizens thereof, at a price not to exceed seven and one-half cents per kilowat hour meter rate.

**Section 5.** Said D. I. Rennecker shall accept this ordinance and notify Council in writing of such acceptance within ten days of the passage thereof, which acceptance, [fol. 268] together with this ordinance shall constitute a contract, otherwise the Village of Orrville shall be no longer bound thereby and this ordinance shall be void.

Section 6. This ordinance shall take effect and be in force from and after the earliest period allowed by law, and after its acceptance and legal publication.

Passed March 12, 1910.

A. J. Heller, Mayor. F. E. Wolfe, Clerk.

Proof of Publication

STATE OF OHIO,  
Wayne County, ss:

P. E. Krieble, Manager of The Orrville Courier a newspaper of general circulation within said Wayne County, being duly sworn, deposeth and sayeth that the notice of which the annexed is a copy, was published in said newspaper two consecutive weeks, commencing on the 15th day of March, 1910.

P. E. Krieble.

Pub. Charges .....	\$19.00
Affidavit .....	.25
<hr/>	
Total .....	19.25

Sworn to and subscribed before me this 4th day of April, 1910. Levi Brenneman, Notary Public.  
(Notarial Seal.)

(The same as above printed and pasted on page 276.)

[fol. 269] Volume 5 of the Council Record, Page 276

Minutes of Called Meeting Held March 12, A. D. 1910

Mayor Heller presiding.

Members present were: Higgins, Shantz, Kochler, Frazier, King. Absent: Kroph.

Orrville Light, Heat and Power Company Ordinance

Orrville Light, Heat and Power Company Ordinance.  
Moved by — and seconded by King that the ordinance be received and passed to its first reading.

Ayes: All. Nays: None.

Motion carried.

Moved by King, Seconded by Shantz, that the rules be suspended, further reading be dispensed with, and the ordinance passed to its second reading.

Ayes: All. Nays: None.

Motion carried.

Moved by King, Seconded by Shantz, that the rules be suspended, further reading dispensed with, and the ordinance passed to its third reading.

Ayes: All. Nays: None.

Motion carried.

Moved by King, seconded by Higgins, that the ordinance be adopted as read.

Ayes: All. Nays: None.

Motion carried.

[fol. 270] Volume 6 of the Council Record, Page- 238, 242  
to 243

Minutes of Regular Meeting Held July 21, 1913

Mayor Willaman, presiding.

Members present: Leickheim, Seas, Haibrige, Reed, Zell. Absent: Waite.

Electric Plant Resolution

Reading of Resolution declaring it necessary to issue bonds for the purpose of purchasing housing, erecting and installing machinery, poles, wires, and appliances, necessary or desirable for the operation of an electric lighting and power plant, in the sum of Forty-one thousand dollars (\$41,000.00) and that the question of issuing and selling the bonds of said Village be submitted to a vote of the qualified electors of said Village at a special election to be held in said Village on Tuesday, August 26, 1913.

Moved by Reed, seconded by Seas, that the Resolution be accepted as read and passed to the first reading.

Ayes: Leickheim, Seas, Harbridge, Reed, Zell. Nays: None.

Motion carried.

Moved by Seas, seconded by Harbridge, that the rules be suspended, further reading dispensed with and the Resolution passed to the second reading.

Ayes: Leickheim, Seas, Harbridge, Reed, Zell. Nays: None.

Motion carried.

Moved by Leickheim, seconded by Harbridge, that the [fol. 271] rules be suspended, further reading dispensed with, and the Resolution passed to the third reading.

Ayes: Leickheim, Seas, Harbridge, Reed, Zell. Nays: None.

Motion carried.

Moved by Reed, seconded by Leickheim, that the rules be suspended, further reading dispensed with, and the Resolution be adopted as read.

Ayes: Leickheim, Seas, Harbridge, Reed, Zell. Nays: None.

Motion carried.

[fol. 272] Volume 5 of the Ordinance Records, Page- 136,  
137, 150, 153 and 166

November 17, 1913,

An ordinance to issue bonds for the purpose of purchasing, housing, erecting, and installing machinery, poles, wires, and appliances necessary or proper for the operation of an electric lighting and power plant.

Whereas, at a special election held for that purpose on the 26th day of August, 1913 the question of issuing the bonds of said village in an amount in excess of one (1) per cent of the total value of all property in such village as listed or assessed for taxation that is, in the sum of forty one thousand dollars \$41,000.00 for the purpose of purchasing, housing, erecting and installing machinery poles, wires and appliances, necessary or proper, for the operation of an electric lighting and power plant, was submitted to a vote of the qualified electors of said village and,

Whereas, two-thirds of the voters voting at such election upon the question of issuing said bonds voted in favor thereof, now therefore,

Be it ordained by the council of the village of Orrville, State of Ohio:

Section 1. That the bonds of said village be issued in the sum of forty one thousand dollars (\$41,000.00) for the

purpose of purchasing housing, erecting and installing machinery, poles, wires and appliances necessary or proper, for the operation of an electric lighting and power plant. Each of said bonds shall be dated January 1, 1914, and of [fol. 273] such amounts and due at the times as follows:

Two	2 bonds of five hundred dollars.	\$500.00	each, due July 1, 1915.
"	2 "	\$500.00	" July 1, 1916.
"	2 "	\$500.00	" July 1, 1917.
"	2 "	\$500.00	" July 1, 1918.
Six	6 "	\$500.00	" July 1, 1919.
"	6 "	\$500.00	" July 1, 1920.
"	6 "	\$500.00	" July 1, 1921.
"	6 "	\$500.00	" July 1, 1922.
"	6 "	\$500.00	" July 1, 1923.
Eight	8 "	\$500.00	" July 1, 1924.
"	8 "	\$500.00	" July 1, 1925.
"	8 "	\$500.00	" July 1, 1926.
"	8 "	\$500.00	" July 1, 1927.
Ten	10 "	\$500.00	" July 1, 1928.
		\$500.00	" July 1, 1929.

with interest on said bonds at the rate of Five per cent (5%) per annum payable semi-annually January 1st and July 1st of each year.

Section 2. Said bonds shall express upon their face the purpose for which they are issued and that they are issued in pursuance of this ordinance. They shall be prepared, issued and delivered under the direction of the finance committee of the council and the village clerk, shall be signed by the mayor and Clerk and sealed with the corporate seal of said village and the interest coupons attached to said bonds shall be executed by the village clerk with his signature thereto, or he shall have his signature printed or lithographed thereon.

Section 2. Said Bonds shall first be offered at par and accrued interest to the trustees of the sinking fund of the said village in their official capacity, and if the sinking fund trustee refuse to take any or all of said bonds at par [fol. 274] and accrued interest, then said bonds not so taken shall be offered at par and accrued interest to the commissioners of the sinking fund of the village school district and such of said bonds as are not taken shall be advertised for public sale and sold in the manner provided by law, but not for less than their par value and accrued interest.

Section 4. The proceeds from the sale of said bonds, except the premium and accrued interest shall be placed in the village treasury to the credit of the electric light plant fund and shall be used for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances, necessary or proper for the operation of an electric lighting and power plant and for no other purpose; and the premiums and accrued interest received from such sales shall be transferred to the trustees of the sinking fund, to be applied by them in the manner provided by law.

Section 5. That for the purpose of rasing a fund to pay the interest upon the said bonds and to create a sinking fund to pay said bonds at maturity, the council of the Village of Orrville, Ohio, hereby orders and directs that an amount of money, sufficient to pay the interest on said bonds as it becomes due and to provide a fund for there redemption at maturity, be placed in the annual-budget each year and until all of said bonds and interest are paid; such amounts so placed in said annual budget shall be placed on the tax duplicate and collected by the same officials in the same manner and at the same time that the taxes for general purposes are collected, and that all funds derived from said taxes shall be placed in a separate and distinct fund, which shall be irrevocably pledged to the payment of interest and principal of said bonds as the same falls due.

[fol. 275] Section 6. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

E. P. Willaman, Mayor.

Attest: A. Jenny, Clerk.  
Passed November 17, 1913.

Proof of Publication

STATE OF OHIO,  
Wayne County, ss:

I, James Higgins, Manager of The Orrville Courier-Crescent, a newspaper of general circulation within said Wayne County, being duly sworn, deposeth and sayeth that the notice of which the annexed is a copy, was published in

said newspaper two consecutive weeks, commencing on the 22nd day of November, 1913.

Pub. Charges, \$21.00.

James Higgins.

Sworn to and subscribed before me this 6th day of December, 1913. N. L. Royer, Notary Public.  
(Notarial Seal.)

(The same as above, printed and pasted on page 153.)

[fol. 276] Volume 5 of the Ordinance Records, Page- 136 and 137, 150 to 153, and also Page 166

Resolution declaring it necessary to issue bonds for the purpose of purchasing, housing, erecting and installing machinery, poles, wires, and appliances necessary or desirable for the operation of an electric lighting and power plant.

Be it resolved by the Council of the Village of Orrville, State of Ohio, two thirds of all the members elected thereto concurring, that it is necessary to issue and sell bonds in the fiscal year beginning January 1st, 1913, for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances, necessary or desirable for the operation of an electric lighting and power plant in an amount greater than one per cent of the total value of all property in said Village as listed and assessed for taxation to wit: in the sum of forty one thousand dollars (\$41,000.00) and that the question of issuing and selling the bonds of said Village in excess of said one per cent, that is, in the sum aforesaid, be submitted to a vote of the qualified electors of said Village at a special election to be held in said Village on Tuesday, August 26th, 1913, at the regular place or places of voting in said Village and said election shall be conducted canvassed and certified in the same manner as general municipal elections. That the Mayor be and he is hereby directed to give public notice of the time and place of said election in the manner provided by law.

That the Clerk be and hereby is directed to certify a copy of this Resolution to the Deputy State Supervisors of Wayne County, Ohio.

E. P. Willaman, Mayor.

[fol. 277] Attest: A. Jenny, Clerk.

Passed, July 21, 1913.

(Same as above printed and pasted on page 137.)

Proof of Publication

STATE OF OHIO,  
Wayne County, ss:

I, Charles F. Kraft, Editor-Manager of The Orrville Courier-Crescent, a newspaper of general circulation within said Wayne County, being duly sworn, deposeth and sayeth that the notice of which the annexed is a copy was published in said newspaper two consecutive weeks, commencing on the 25th day of July, 1913.

Pub. Charges, \$7.50.

Charles F. Kraft.

Sworn to and subscribed before me this 1st day of August, 1913. N. L. Royer, Notary Public. (Notarial Seal.)

(Same as above printed and pasted on page 137.)

To the Deputy State Supervisors of Elections, Wayne County, Ohio:

I hereby certify that I am the duly elected, qualified and acting Clerk of the Village of Orrville, Ohio, and that the above written is a true and accurate copy of a Resolution, adopted by the Council of the Village of Orrville, Ohio, at the regular meeting July 21, 1913.

In witness whereof witness my hand and official seal this 23rd day of July, 1913.

A. Jenny, Clerk. (Notarial Seal.)

[fol. 278]

## Legal Notice

Notice is hereby given that in pursuance of a resolution of the Council of the Village of Orrville, passed on the 21st day of July, 1913, there will be submitted to the qualified electors of said village at a special election to be held in the Village of Orrville on Tuesday, August 26th, 1913, the question of issuing bonds of said village in an amount in excess of one per cent of the total value of all the property in such village as listed and assessed for taxation, that is to say, in the sum of forty-one thousand dollars, (\$41,000.00) for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances, necessary or desirable, for the operation of an electric lighting and power plant.

Those who vote in favor of the proposition of issuing the bonds as aforesaid shall have written or printed on their ballots the words "For the Issue of Bonds" and those who vote against the same shall have written or printed on their ballots the words "Against the Issue of Bonds."

E. P. Willaman, Mayor,

July 21, 1913.

## Proof of Publication

STATE OF OHIO,

Wayne County, ss:

I, J. A. Higgins, Manager of the Orrville Courier-Crescent, a newspaper of general circulation within said Wayne County, being duly sworn, deposeth and sayeth that the notice of which the annexed is a copy, was published in said newspaper four consecutive weeks, commencing on the 25th day of July, 1913.

IPub. Charges, \$7.50.

James A. Higgins.

Sworn to and subscribed before me this 5th day of September, 1913. N. L. Royer, Notary Public.  
[fol. 279] (Notarial Seal.)

(Same as above printed and pasted on page 137.)

Volume 7 of the Council Record, Page- 18, 20, 21, 32, and 33

## Record of Council Proceedings

Minutes of Regular Meeting Held November 17th, 1913.  
 Mayor Willaman, presiding.

Members present: Leickheim, Waite, Seas, Harbridge,  
 Houser. Absent: Zell.

1st. Minutes of November 3rd meeting adopted as read.

\* \* \* \* \*

8th. Reading of an ordinance to issue bonds for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances necessary and proper for the operation of a municipal electric light and power plant.

Moved by Waite, supported by Seas, that the ordinance be accepted as read, passed to the first reading.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser. Nays: None.

Motion carried.

Moved by Leickheim, supported by Harbridge, that the rules be suspended, further reading dispensed with, and the ordinance passed to the second reading.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser.  
 Nays: None.

Motion carried.

Moved by Seas, supported by Waite, that the rules be suspended, further reading dispensed with, and the ordinance passed to the third reading.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser.  
 Nays: None

Motion carried.

[fol. 280] Moved by Waite, supported by Seas, that the rules be suspended, further reading dispensed with, and the ordinance be passed to the second reading.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser, Zell.  
 Nays: None.

Motion carried.

Moved by Leickheim, supported by Waite, that the rules be suspended, further reading dispensed with, and the ordinance be passed to the third reading.

**Ayes:** Leickheim, Waite, Seas, Harbridge, Houser, Zell.  
**Nays:** None.

Motion carried.

Moved by Waite, supported by Seas, that the rules be suspended, further reading be dispensed with, and the ordinance be adopted as read.

**Ayes:** Leickheim, Waite, Seas, Harbridge, Houser, Zell.  
**Nays:** None.

Motion carried.

Moved by Waite, supported by Seas, that the rules be suspended, further reading dispensed with, and the ordinance be adopted as read.

**Ayes:** Leickheim, Seas, Waite, Harbridge, Houser.  
**Nays:** None.

Motion carried.

9th. Moved by Waite, supported by Seas, that the board of Public Affairs be instructed to figure on ornamental street lighting and install same, business section.

**Ayes:** All. **Nays:** None.

Motion carried.

[fol. 281] Record of Council Proceedings

Minutes of Adjourned Meeting Held December 29, 1913

Council met pursuant to adjournment regular meeting December 16th, 1913.

Mayor Willaman presiding.

Members present: Leickheim, Waite Seas, Harbridge, Houser, Zell. Absent: None.

\* \* \* \* \*

2nd. Reading of an ordinance entitled "An Ordinance to Authorize an Expenditure of Forty One thousand dollars (\$41,000.00) for purchasing, housing, erecting and installing, machinery, poles, wires and appliances necessary and proper for the municipal electric light plant of the Village of Orrville, Ohio.

Moved by Seas, supported by Harbridge, that the ordinance be accepted as read and passed to the first reading.

**Ayes:** Leickheim, Waite, Seas, Harbridge, Houser, Zell.  
**Nays:** None.

Motion carried.

[fols. 282-300] Petition for rehearing, covering 20 pages, filed June 22, 1925, omitted from this print. It was denied and nothing more by order October 10, 1925.

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[fol. 301] Certificate of lodgment omitted in printing.

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[fol. 302] Clerk's certificate to transcript omitted in printing.

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[fol. 303] **In SUPREME COURT OF OHIO**

[Title omitted]

Municipal corporations—Franchise silent as to duration not perpetual, but indeterminate—Municipality may terminate obligation and withdraw therefrom—Electric light franchise.

Where the contract between a municipal corporation and an electric lighting company is silent as to the duration of the franchise such franchise is not perpetual, but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto. A municipal corporation may therefore voluntarily terminate its obligation under the contract and wholly withdraw therefrom.

(No. 18784. Decided June 2, 1925)

Error to the Court of Appeals of Wayne County

#### OPINION

This was an action in quo warranto begun by the state of Ohio as an original action in the Court of Appeals of Wayne county, Ohio, on the relation of Joseph O. Fritz, prosecuting attorney of Wayne county, asking to oust the defendant from its use of the streets of the village of Orrville for the maintenance of poles, wires, guy wires, and electrical equipment, placed therein by the defendant or

its predecessors in title for the purpose of supplying electricity to the inhabitants of the village for commercial and private lighting purposes.

The plaintiff in error claimed in its pleadings to have the right to maintain such electrical equipment in the streets of the village for such purpose by virtue of a franchise embodied in an ordinance granted by the village upon February 1, 1892, to Ansel P. Gans and Mellville D. Wilson, claimed to be the predecessors in title of plaintiff in error. The pertinent portions of the ordinance are as follows:

"That Ansel P. Gans and Mellville D. Wilson, of Canal Dover, Ohio, their associates, successors and assigns are hereby authorized and empowered to use the streets, lanes, alleys, and avenues of the village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power."

By section 3 it was provided:

"In consideration of the privileges hereby granted the said Gans & Wilson, their associates, successors and assigns shall furnish the Village of Orrville on the several streets, lanes, alleys and avenues not less than twenty-five (25) electric lamps of not less than 2,000 candle power each, to be placed wherever the council may direct in said village of Orrville.

Section 4 provided:

"In consideration of the construction of said electric light plant as herein provided, the council of said village of Orrville hereby agrees and binds itself to take and use the light of said Gans & Wilson, their associates, successors and assigns for the period of ten (10) years from and after the date upon which said light shall be first supplied and to pay same quarter-annually for said lighting a price equal to seventy-two (\$72) dollars per year for each and every lamp of 2,000 candle power, said lamps to be lighted and extinguished and kept in repair by and at the expense of [fol. 304] said Gans & Wilson, their associates, successors and assigns; the total number of lamps thus supplied to be not less than twenty-five 2,000 candle power lamps—are light."

The ordinance contained no express provision as to the right to use the streets in the village to furnish electricity for commercial and private lighting purposes; but the parties construed the ordinance as granting such right, and a plant was constructed in accordance with the ordinance, and electricity for both public and private lighting was furnished. At the trial below, no question was made by the village that the contract embodied in the ordinance had not been accepted.

In 1893 the Orrville Light, Heat & Power Company, a corporation, was formed, which succeeded to the rights and assumed the obligation of Gans & Wilson under the ordinance of 1892, and furnished the village of Orrville with electricity for both public and private lighting. During the year 1907 the Orrville Light, Heat & Power Company sold all of its assets to D. E. Rennicker, divided the proceeds accruing therefrom among its stockholders and ceased to function as a corporation. Rennicker operated the business individually, but under the name of the defunct corporation, until 1913, when, with the approval of the Public Utilities Commission of Ohio, he sold out all of his rights in the business to the Massillon Electric & Gas Company.

Thereafter the village of Orrville constructed and put in operation a municipal lighting plant at about the time of the expiration of a contract embodied in an ordinance described more fully in the opinion, which contract expired upon July 15, 1917.

After the construction and operation of the municipal plant in the village of Orrville, the Massillon Electric & Gas Company no longer furnished electricity for the public lighting of the village, but it did continue to furnish a few of the citizens of Orrville with electricity for commercial lighting purposes. In 1921 the respondent, the Ohio Public Service Company, purchased with the approval of the Public Utilities Commission of Ohio all assets and rights of the Massillon Electric & Gas Company in its lighting business, since which time the respondent has continued to furnish electricity to some of the citizens of the village for commercial lighting purposes.

The petition of the relator in the court below alleged that the defendant has assumed and used and is now using the said franchise rights and privileges as above enumerated;

the same not having been granted to it by any lawful authority and without the consent or authority of the plain-[fol. 305] tiff, the state of Ohio, or of the said village of Orrville.

The respondent's answer claimed the right challenged by the state by virtue of a franchise granted by the village of Orrville to its predecessors in title.

The Court of Appeals in its journal entry found upon the pleadings and the evidence that "the defendant, the Ohio Public Service Company, has, as alleged, exercised franchise and privilege of carrying on business in furnishing commercial and private lighting in the village of Orrville, Wayne county, Ohio, contrary to and without the authority of the laws of the State of Ohio, and contrary to and without authority from said village of Orrville," and rendered a judgment of ouster.

The case comes into this court upon petition in error. Further facts are stated in the opinion.

Mr. Franklin L. Maier, and Mr. C. H. Henkel, for plaintiff in error.

Mr. Joseph O. Fritz, Mr. Alton H. Etling, and Mr. L. R. Critchfield, for defendant in error.

ALLEN, J.:

Throughout the course of this opinion the Ohio Public Service Company will be called the respondent, and the defendant in error will be called the relator.

The relator contended in the Court of Appeals that the respondent had been granted no franchise rights, or that, if such rights had been acquired, they had been forfeited by abandonment and nonuser. These allegations were denied by the respondent. Since the court refused to give the judgment of ouster either upon the ground that no franchise had been given, or upon the ground of abandonment and nonuser, it is evident that the Court of Appeals must have found against the relator upon these questions of fact. There is evidence in the record to sustain the conclusion of the Court of Appeals upon these questions, and we therefore shall not discuss them, but shall pass directly to the main point of law involved in the case.

The relator contends that the respondent is using the streets of Orrville for commercial lighting purposes without

the authority of the state or the village. Respondent on the other hand claims that the organization of the Orrville Light, Heat & Power Company in 1893 constituted a grant from the state of Ohio to Gans & Wilson and their associates to operate and maintain a lighting system for the village of Orrville and the inhabitants thereof, and that this grant from the state, taken together with the ordinance of February 1, 1892, created and fixed rights, which the village, as a subsidiary of the state, had no power to destroy.

The respondent further claims that these rights were vested, not only in the Orrville Light, Heat & Power Company, but also in its assignees and successors in interest. Moreover, the respondent claims that the assignment by the Orrville Light, Heat & Power Company to Rennicker, in [fol. 306] 1907, transferred, not only the rights granted by the state to the Orrville Light, Heat & Power Company in 1893, but also the rights granted by the council of the village of Orrville to Gans & Wilson in 1892.

It is to be emphasized that this case is not one in which the occupation of the village streets by the original grantee from the state is questioned. In this case the assignee of the original grantee seeks to continue to occupy the streets of the village for commercial lighting purposes. Also the occupation of the village streets is not questioned by the village, but by the state itself, in an action *in quo warranto*.

The respondent concedes in his answer, briefs, and argument that the ordinance of 1892 constituted a special franchise, and bases his entire contention upon that premise. The question of the nature of the grant secured from the state by the Orrville Light, Heat & Power Company in its charter of incorporation was practically not discussed in argument, but we shall examine it somewhat in detail.

The statutes in force governing this situation in 1893, at the time when the franchise ordinance was obtained from the village by Gans & Wilson, were comprised in Section 3454, Revised Statutes, now Section 9170, General Code, the statute found in 83 Ohio Laws, 143, and Section 3471a, Revised Statutes, now Section 9192, General Code. Read together, these sections bestowed upon electric lighting companies the same general right possessed by telegraph and telephone companies, so far as applicable, to erect their equipment within the public highways, provided the same

should not incommod the public in the use of the roads. These sections read as follows:

Section 9170. "A magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommod the public in the use thereof."

Section 9192. "Excepting sections ninety-one hundred and seventy-eight and ninety-one hundred and seventy-nine, so far as applicable, the provisions of this chapter shall apply to companies organized for the purpose of supplying public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or an automatic package carrier. Save what are given by such excepted sections, every such company shall have the powers and be subject to the restrictions herein prescribed for magnetic telegraph companies."

[fol. 307] At this time the statute enacted in 83 Ohio Laws, 143, was in force. It had not been expressly repealed by the enactment of Revised Statutes, Section 3471a (Section 9192, General Code), and it may be questioned whether it was repealed by implication in that enactment inasmuch as in that statute the laws as to telegraph companies were made to apply to companies furnishing electricity "so far as the same may be applicable." This statute, 83 Ohio Laws, 143, authorized electric companies to construct lines for conducting electricity for power and lighting purposes through alleys, etc., "with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe."

These sections were construed in the case of *Hardin-Wyandot Lighting Co. v. Village of Upper Sandusky*, 93 Ohio St., 428, 113 N. E., 402, which held that:

"The Act of January 26, 1887 (84 Ohio Laws, 7), made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies, so far as practicable, and while said act remained in force the power of such companies to occupy the streets of a municipality was derived from the state."

The syllabus did not state that the statute of 83 Ohio Laws, 143, was repealed by implication, and in the judgment of the writer of this opinion such was not the effect of the enactment of Section 9192, General Code, with its proviso that the provisions of the chapter should apply to electric light and power companies "so far as applicable."

However that may be, the above sections did not confer upon the Orrville Light, Heat & Power Company any specially designated rights in the streets of the city of Orrville. Those rights must have been conferred either in the charter of incorporation or in the ordinance of 1892.

It is not of great moment to decide whether the respondent is correct in claiming that the ordinance of 1892 constituted a special franchise to use the streets of the village. In either case, whether the right in question was derived from the state or the village, it was not under the circumstances set forth in this record assignable. If it was a state right, it could not at the time of the attempted assignment to Rennicker in 1907 be transferred without the consent of the state. If it was a special franchise from the village, it could not after 1896 be exercised by an assignee without the consent of the village. The record does not show that the Orrville Light, Heat & Power Company was by its charter given authority to dispose of its franchise or of its property essential to the performance of its public duties, and no such statutory authority existed prior to 1896; that is, before the time of the amendment of 1896 no specific authority had been given by the state to the Orrville Light, Heat & Power Company to make the assignment of 1907 to Rennicker.

[fol. 308] In the year 1896 Section 3471a, Revised Statutes, was amended (92 Ohio Laws 205), and the amendment specifically prohibited electric companies from exercising in a municipality rights granted them under Section 3454, Revised Statutes (Section 9170, General Code), without the consent of the municipality.

The amendment of 1896 reads in part as follows:

"In order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such

municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court."

This amendment took effect prior to the expiration of the 10-year period established in Section 4 of the ordinance of 1892, and prior to any transfer by the Orrville Light, Heat & Power Company of its rights in the village streets, whether secured from the state or from the village.

In this statute the Legislature revoked whatever right had been given to public utilities in general under Sections 3454 and 3471a, Revised Statutes, to maintain their equipment in streets in a municipality without the consent thereof, and, as under the Constitution the Legislature was authorized to revoke such rights theretofore granted, the revocation became effectual upon the effective date of the amendment. This revocation was not retroactive and did not affect state grants theretofore given, including that secured by the Orrville Light, Heat & Power Company in 1893.

However, the rights the Orrville Light, Heat & Power Company had secured as a quasi public corporation under its charter of incorporation, under Section 3454, Revised Statutes, and under Section 3471a, Revised Statutes, could not be assigned without the consent of the state. 12 Ruling Case Law, pp. 217 and 218, Section 43; Brunswick Gaslight Co. v. United Gas, Fuel & Light Co., 85 Me., 532, 27 A., 525, 35 Am. St. Rep., 385, 403, note, and cases cited; Joyce on Franchises, Section 462; 47 L. R. A., 87, note; Penna. Rd. Co. v. St. Louis, Alton & Terre Haute Rd. Co., 118 U. S., 290, 6 S. Ct., 1094, 30 L. Ed., 83; Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill., 530, 13 N. E., 169, 2 Am. St. Rep., 124; Central Transportation Co. v. Pullman's Palace-Car Co., 139 U. S., 24, 11 S. Ct., 478, 35 L. Ed., 55; Branch v. Jesup, 106 U. S., 468, 1 S. Ct. 495, 27 L. Ed., 279; Wright v. Milwaukee Elec. Ry. & Light Co., 95 Wis., 29, 69 N. W., 791, 36 L. R. A., 47, 60 Am. St. Rep., 74; Roper v. McWhorter, 77 Va., 214; State v. Morgan, 28 La. Ann., 482; Wood v. Truckee Turnpike Co., 24 Cal., 474.

[fol. 309] The respondent argues that a property right was involved in this case, and that, although the Orrville Light, Heat & Power Company could not legally transfer its corporate franchise, it could legally transfer its rights in what it calls the special franchise contract of 1892 with the village, because a property right is transferable. But even in the case of tangible property a transfer by quasi public corporations of property essential to the exercise of franchises is ineffectual without the consent of the state. The rule is well settled that property which is essential for the performance of the duties which the corporation owes to the public, or which, as some cases put it, is necessary for the exercise of its franchises, cannot be alienated, either voluntarily or by a forced sale, without legislative authority. Joyee on Franchises, Section 462; Coe v. Columbus, P. & I. Rd. Co., 10 Ohio St., 372, 75 Am. Dec., 518; Black v. Delaware & Raritan Canal Co., 22 N. J., Eq., 130, 399; Abbott, Adm'x., v. Johnstown, G. & K. H. Rd. Co., 80 N. Y., 27, 36 Am. Rep., 572; Louisville Water Co. v. Hamilton, 81 Ky., 517; Susquehanna Canal Co. v. Bonham, 9 Watts & S., (Pa.), 27; 42 Am. Dec., 315; Youngman v. Elmira & Williamsport Rd. Co., 65 Pa., 278; Ammant v. New Alexandria & Pittsburgh Turnpike Road, 13 Serg. & R., (Pa.), 210, 15 Am. Dec., 593; Central Transportation Co. v. Pullman's Palace-Car Co., 139 U. S., 24, 11 S. Ct., 478, 35 L. Ed., 55; Richardson v. Sibley, 93 Mass. (11 Allen) 65, 87 Am. Dec., 700; Bd. of Commrs. of Tippecanoe Co. v. Lafayette, Munucie & Bloomington Rd., 50 Ind., 85; Oregon Ry. & Navigation Co. v. Oregonian Ry. Co., 130 U. S., 1, 9 S. Ct., 409, 32 L. Ed., 837; Attorney General ex rel. Corporation Commissioner v. Haverhill Gaslight Co., 215 Mass., 394, 101 N. E., 1061, Ann. Cas., 1914C, 1266; Thomas v. West Jersey Rd. Co., 101 U. S., 71, 83, 25 L. Ed., 950.

Whether we consider the rights secured by the Orrville Light, Heat & Power Company, therefore, to be a state franchise, or, as claimed by respondent, to be a property right arising from a franchise granted by the municipality, these rights were not assignable in 1907 without the consent of the state.

In the cases cited by respondent, such as City of Louisville v. Cumberland Telephone & Telegraph Co., 224 U. S., 649, 32 S. Ct., 572, 56 L. Ed., 934, and Trust Co. v.

City of Cincinnati, 10 O. Fed. Dec., 112, 116, either the consent of the state to the assignment in question had either been given in the charter or there was no distinct statutory limitation of such right of assignment. In this case such a distinct limitation of the right of a corporation to assign its franchises and property necessary to the performance of its public duties existed in the amendment of 1896. The rights acquired by the Orrville Light, Heat & Power Company from the state in 1893, under Sections 3454 and 3471a, Revised Statutes, could not be annulled or revoked by the village of Orrville, nor by the state of Ohio, after the passage of the amendment of 1896. But the powers thus acquired from the state could not be transferred without the consent of the state, and the property necessary to exercise [fol. 310] such powers could not be transferred without the consent of the state.

Was such consent given? It was not given in the charter of incorporation; it was not given in statute; and, furthermore, in the amendment of 1896 the Legislature expressly limited the right of assignment by providing that the streets of a village after that time could not be occupied by electric companies without the consent of the municipality. This amendment took effect prior to the attempted assignment to Rennicker in 1907, and hence Rennicker and his successors in operating the business were operating without the authority of the state of Ohio.

In other words, in the amendment of 1896 the state, so far from consenting to the assignment of the right to erect and maintain electric equipment in the streets of Orrville, limited the right of such assignment, because it conditioned such maintenance thereafter upon the consent of the municipality. Hence the assignment of 1907 was not effectual to transfer to Rennicker the right to operate in the village of Orrville. Moreover, since electric companies, after 1896, were prohibited by the state from operating in municipalities without their consent, after that date the assignee of the Orrville Light, Heat & Power Company, which operated without the consent of the village, was operating without the authority of the state of Ohio.

This holding is not in conflict with the decision in the case of Hardin-Wyandot Lighting Co. v. Village of Upper Sandusky, 93 Ohio St., 428, 113 N. E., 402, affirmed in the

Supreme Court of the United States, 251 U. S., 173, 40 S. Ct., 104, 64 L. Ed., 210, for the reason that the question of the assignability of the franchise was not raised in that case, and for the further reason that in that case the village, not the state, was attacking the exercise of the franchise.

The question as to whether the respondent's predecessors in interest were acting without authority from the village in occupying the streets of Orrville for the purpose of commercial lighting did not arise for a considerable period. In 1902, at the expiration of the 10-year period established in the original ordinance, the village passed an ordinance by which the company contracted to light the streets of the village for a period of 5 years, in which ordinance the village agreed to pay a set price, and fixed the price at which the company should "furnish light for full commercial purposes in said village to the citizens thereof." This contract was executed by both parties. At the expiration of this 5-year period, in 1907, a similar ordinance was passed by the village, contracting with the company for the lighting of the streets of the village for another period of 5 years, at [fol. 311] a price fixed by the village. During the period between 1907 and 1912 the Orrville Light, Heat & Power Company sold its assets to one D. L. Rennicker, and the village of Orrville later enacted another similar 5-year contract under which Rennicker furnished light for commercial lighting to the citizens of the village at a price fixed by the village. These contract ordinances, in distinction to the ordinance of February 1, 1892, given in the statement of facts, conferred no specially designated right to use the streets. In other words, all of the ordinances, beginning with 1902, were contract ordinances from which the power to use the streets arose by implication only and ceased with the expiration of the several ordinances. Before the expiration of the last-named 5-year period, in 1917, with the approval of the Public Utilities Commission, Rennicker sold out his interest in the lighting business to the Massillon Electric & Gas Company, which, in turn, in 1921, sold its assets and rights to the respondent, the Ohio Public Service Company.

Under the amendment of 1896 (92 O. L., 204), no assignee of the Orrville Light, Heat & Power Company could operate in the streets of the village of Orrville without the consent

of the village. This consent was given to the Orrville Light, Heat & Power Company and to its successor, Rennicker, by the village in the contract ordinances, but was never given to the Massillon Electric & Gas Company. It is true that the city aequiesced in the exercise of these rights by the Massillon Electric & Gas Company until the end of the last 5-year contract, and hence cannot attack the exercise of those rights during that period; but all of these rights ceased in 1917 at the expiration of the last 5-year contract. The Massillon Electric & Gas Company succeeded only to the rights of Rennicker, and those rights expired in 1917, and the Massillon Electric & Gas Company had thereafter no right which it could transfer to the Ohio Public Service Company under the laws of the state of Ohio. Moreover, as it was the state itself which prohibited such use of the streets of municipalities after 1896, without the consent of the village, any exercise of those rights after the expiration of the last 5-year contract in 1917 was had without the consent and authority of the state, unless the passage of the franchise ordinance in February, 1892, constituted an irrevocable consent upon the part of the village.

With regard to this point it is the contention of the relator that such rights as the respondent acquired against the village of Orrville from others, particularly such as may have been granted to Gans & Wilson by the ordinance of the village passed upon February 1, 1892, are indeterminate, existing only so long as the parties mutually agree, and that the same are terminated by an ordinance of the village passed June 18, 1923.

The respondent urges that inasmuch as the ordinance passed by the village council upon February 1, 1892, granted a franchise indefinite as to time, it constituted a perpetual franchise to do the acts complained of, and could not be [fol. 312] terminated by any act of the village.

The record shows that the ordinance of February 1, 1892, creating the franchise for the erection and maintenance of electric wire mains and apparatus in the streets of the village of Orrville, Ohio, contained no express provision as to the duration of the franchise. It also contained no express provision as to the right of the company to furnish electricity for commercial and private lighting purposes through the village streets. However, after the construc-

tion of the electric light plant, electricity was actually furnished not only for public but also for commercial and private lighting purposes.

In 1923 the council of the village of Orrville repealed the ordinance of 1892, ordered the respondent to remove its equipment from the streets of the village within 30 days, and notified the respondent that "all rights and privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including the said Ohio Public Service Company, be and the same are hereby terminated and ended."

It is therefore evident that, in so far as it was within the power of the village so to do, it terminated and revoked the franchise of 1892.

Was the right created by the ordinance of 1892 an irrevocable franchise? We think not for the following reasons:

(1) That it was the intention of the parties that the franchise should terminate at the end of 10 years.

(2) That under the law as laid down in the case of *East Ohio Gas Co. v. City of Akron*, 81 Ohio St., 33, 90 N. E., 40, 26 L. R. A., (N. S.), 92, 18 Ann. Cas., 332, which was followed in *East Ohio Gas Co. v. City of Cleveland*, 106 Ohio St., 489, 140 N. E., 410, the franchise is not perpetual, but indeterminate merely, existing only so long as the parties mutually agree thereto.

There are circumstances in this record which show an intention upon the part of the council in passing the ordinance of February 1, 1892, to give a mere revocable right after the expiration of 10 years. Section 4 provided that "in consideration of the construction of said electric light plant \* \* \* the council of the said village of Orrville hereby agrees and binds itself to take and use the light of said Gans and Wilson, their associates, successors and assigns for the period of ten (10) years from and after the date upon which said light shall be first supplied. \* \* \*"

The right to do commercial lighting is nowhere expressly granted, and arose as an incident to the right to do public lighting, as to which the village bound itself for 10 years only to take and use the light provided by Gans and Wilson. At the conclusion of the 10 years, in 1902, the village, without referring in any way to the ordinance of 1892, or

to the rights and obligations thereunder, passed an ordinance by which the Orrville Light, Heat & Power Company, one of the predecessors in interest of the respondent herein, contracted to light the streets of the village for a period of 5 years. This contract was fully performed [fol. 313] by both parties. At the expiration of this contract in 1907, the village passed another ordinance by which it contracted that the same company should have the lighting of the streets of the village for another period of 5 years, and fixed the price at which the company should furnish light for commercial purposes. Another 5-year franchise ordinance of similar character, not referring to the ordinance of 1892, nor to any of the subsequent ordinances, was passed in 1912, its period to begin at the expiration of the contract of 1907, in which the price was fixed at which light for commercial lighting should be furnished to the citizens of the village. In 1917, at the expiration of the last 5-year contract referred to, the village constructed a municipal lighting plant and put the same into operation.

The record does not show that the predecessors in title of the respondent questioned the action of the village in enacting the 5-year ordinances, or claimed that none of these 5-year contracts was necessary. The use of the streets was plainly necessary for lighting the streets of the village by electricity. In view of the fact that the 10-year period was placed upon one of the specific price features of the original ordinance, and that the record fails to show that in the frequent negotiations which took place in the passage of the subsequent ordinances it was ever questioned that the village had a right to enact these contract ordinances for electric commercial lighting, fixing the price that should be paid therefor and placing a definite time limit upon the duration of the several contracts set forth therein, we think that the parties intended that at the expiration of the 10-year period the right to sell commercial lighting for private purposes should be subject to further contract and revocable at will. In this view of the case the phrase "to the associates and assigns of Gans & Wilson" in the ordinance of 1892 meant that Gans & Wilson could assign the contract within the 10-year period, and not after that time.

This case upon the facts, then, does not run counter to the decision in the case of Northern Ohio Traction & Light Co. v. State of Ohio, ex rel. Pontius, 245 U. S., 574, 38 S. Ct., 196, 62 L. Ed., 481, L. R. A., 1918E, 865, for circumstances are present herein showing an intention upon the part of the parties to give and receive a mere revocable right after the expiration of the 10-year period.

This court has spoken in no uncertain terms upon the question of franchises indeterminate in duration. As laid down in the case of East Ohio Gas Co. v. City of Akron, 81 Ohio St., 33, 90 N. E., 40, 26 L. R. A., (N. S.), 92, 18 Ann. Cas., 332, the rule is that "where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto. The incorporated company may therefore voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom.

In the East Ohio Gas Company case, *supra*, the question was whether the incorporated companies might voluntarily [fol. 314] forfeit their right to exercise their privileges under certain franchises within the municipality. Herein the municipality seeks to oust the incorporated company. There is no logical reason why the rule announced above should apply in favor of the incorporated company and not in favor of the municipal corporation, and, in fact, this court has made that precise holding in *Village of Oak Harbor v. Oak Harbor Natural Gas Co.*, 106 Ohio St., 660, 140 N. E., 943.

As we have in this case an indeterminate franchise, concerning which it is conceded that one party to the contract creating the franchise has decisively indicated its intention to terminate its obligation thereunder, it is evident that whatever rights the respondent had in the streets of Orrville ceased when the village terminated those rights by the repealing ordinance. As the right to do private and commercial lighting was incidental to the public right, it ceased when the public right ceased, and the respondent has been exercising its rights in the street against the authority of the state and of the municipality.

The respondent further contended that, inasmuch as it has been operating under recognition and approval of the Public Utilities Commission, and the Public Utilities Commission has made no order requiring it to abandon its franchise rights, it cannot be ousted under the laws of this state.

We are not impressed with the proposition that the approval and recognition of the Public Utilities Commission constitutes a judgment as to the legality of the position occupied by the respondent. If a corporation is doing business as a public utility within a municipality, without authority from the state and the municipality, the mere fact that it is recognized by a commission which is itself a creature of the state will not validate its existence, nor deprive this court of its constitutional jurisdiction *in quo warranto*.

The respondent further contends that since February 1, 1892, the council of the village has recognized the right of the respondent and its predecessors in interest, and is now estopped to deny these rights. Upon a thorough consideration of the record we think that no estoppel has been established here. The question of the perpetuity of the franchise was never directly raised in any prior court proceedings between the village and the respondent. Moreover, the fact that the council of Orrville repeatedly gave to the successors of the original grantees 5-year contracts for commercial lighting in which it fixed the price to be paid therefor is inconsistent with recognition upon its part that the franchise granted in the original ordinance was perpetual. Accordingly this contention also will be overruled.

For the above reasons the decision of the Court of Appeals will be affirmed.

**Judgment affirmed.**

Marshall, C. J., Matthias, Day, Kinkade and Robinson, JJ., concur.

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[fol. 315] Reporter's certificate to foregoing paper omitted in printing.

[fol. 316] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION  
BY PLAINTIFF IN ERROR OF PARTS OF THE RECORD TO BE  
PRINTED WITH PROOF OF SERVICE—Filed January 21,  
1926.

1. That the Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Wayne County, Ohio, and in refusing to reverse said judgment and remand this cause to said Court for further proceedings.

2. That said judgment of the Supreme Court of the State of Ohio in this cause is in violation of and repugnant to Section 10 of Article I of the Constitution of the United States of America, for the reason that it impairs the obligation of the contract between the plaintiff in error and the State of Ohio.

3. That said judgment of the Supreme Court of the State of Ohio in this cause is in violation of and repugnant to Section 10 of Article I of the Constitution of the United States of America, for the reason that it impairs the obligation of the contract between the plaintiff in error and the Village of Orrville.

[fol. 317] 4. That the judgment of the Supreme Court of the State of Ohio in this cause is in violation of and repugnant to Section 1 of the 14th Amendment to the Constitution of the United States as it deprives the plaintiff in error of its property without due process of law.

5. That the Supreme Court of the State of Ohio erred in holding as follows, to-wit:

a. That the franchises, rights and grants of the plaintiff in error and its predecessors in title acquired under an Act of the Legislature of the State of Ohio passed on the 26th day of January, 1887, were revoked, annulled and canceled by the Act of said Legislature passed on the 21st day of April, 1896.

b. In holding that the franchises, grants and rights of the plaintiff in error and predecessors in title to distribute electricity in said Village of Orrville, Ohio, were revoked,

annulled and canceled by the passage of a resolution and ordinance by the said Village passed by the Council on the 18th day of June, 1923, under authority of the provisions of said Act of April 21, 1896.

c. In holding that the franchises, grants and rights of plaintiff in error acquired from the State of Ohio, under said Act of the Legislature of said State, passed January 26, 1887, about referred to, and the amendments thereto, were revoked, annulled and canceled by the Act of the Legislature of said State passed on the 21st day of April, 1896, and above referred to, and further, in holding that said Act of April 21, 1896, conferred upon the Council of the Village of Orrville authority to cancel and annul said franchises, grants and rights of the plaintiff in error by the passage of a resolution and ordinance on June 18, 1923.

d. In rendering said final judgment in that it impaired the obligation of the contract made between the State of Ohio and the Orrville Light, Heat & Power Company, the predecessor in title to the plaintiff in error under and pursuant to said Act of January 26, 1887, granting to said company the franchise and right to use the public streets of the Village of Orrville for the transaction of the business for which it was incorporated to furnish electric light, heat and power to said Village and its inhabitants, and the consent and agreement by the authorities of the Village of Orrville, Ohio, as expressed in the ordinance of February 1, 1892, relative to the mode and manner of the use of the streets, alleys, lanes, squares and public places in said Village by the equipment necessary for said service, which contract, grant, franchise and right was acquired for a valuable consideration by plaintiff in error in 1921, and is now owned by the plaintiff in error.

e. In interpreting said Act of April 21, 1896, as revoking and annulling the grants, franchises and rights granted by the State of Ohio to the plaintiff in error and to the Orrville Light, Heat & Power Company under the provisions of the Act of said Legislature passed January 26, 1887, as such interpretation is in conflict with and contrary to a previous interpretation of said Act by the said Supreme Court of the State of Ohio in the case pending therein entitled "The Hardin-Wyandot Lighting Company vs. Vil-

lage of Upper Sandusky," 93 O. S., 428, decided February 15, 1916, by said Court, and which decision was affirmed by the Supreme Court of the United States on December 15, 1919 (251 U. S., 173), in that the plaintiff in error, relying upon said former interpretation and its affirmance by the Supreme Court of the United States, did on or about the 29th day of October, 1921, purchase said electrical plant in the Village of Orrville, and said franchise, grant and right, of said Orrville Light, Heat & Power Company.

f. In interpreting said Act of April 21, 1896, as giving authority to the Village of Orrville to cancel, revoke and annul by the passage of said resolution and said ordinance, by its Council, on June 18, 1923, the contract, rights and [fol. 319] franchises of the plaintiff in error, and of its predecessor in title, The Orrville Light, Heat & Power Company, granted by the State of Ohio under the Act of January 26th, 1887, such interpretation being contrary to and in conflict with the former decision of the said Supreme Court of the State of Ohio in the case of the Hardin-Wyandot Lighting Company vs. The Village of Upper Sandusky, above referred to, in that the plaintiff in error, relying upon said former interpretation and its affirmance by the Supreme Court of the United States, did on or about the 29th day of October, 1921, purchase said electric plant in the Village of Orrville, and said franchises, grants and rights of said The Orrville Light, Heat & Power Company.

g. In refusing to hold and decide that the Act of the Legislature of the State of Ohio passed on the 21st day of April 1896, impaired the obligation of the contract, namely, the franchise, grant and right of plaintiff in error acquired from the State of Ohio under Act of the Legislature of said State passed January 26, 1887.

h. In refusing to hold and decide that the ordinance and resolution of said Village of Orrville passed by the Council thereof on the 18th day of June, 1923, impaired the obligations of the contract, namely, the franchises, grants and rights of the plaintiff in error, acquired from the State of Ohio under Act of the Legislature of said State passed January 26, 1887.

i. In refusing to hold and decide that the ordinance and resolution of the Village of Orrville passed by its Council on the 18th day of June, 1923, impaired the obligation of a contract, namely, the franchise, grant and right of the plaintiff in error acquired from the Village of Orrville under the ordinance passed by the Council of said Village on February 1, 1892.

j. In holding that the franchises, grants and rights of plaintiff in error constituted merely a contract between the Village of Orrville, Ohio, and the plaintiff in error, and [fol. 320] its predecessors in title, and that said Village of Orrville, Ohio, was authorized to terminate its obligations under said contract and to wholly withdraw therefrom.

k. In holding that the franchises, grants and rights of plaintiff in error, and its predecessors in title, acquired from the State of Ohio under the Act of January 26, 1887, were not transferable and assignable without the consent of the State of Ohio and of the Village of Orrville, Ohio.

l. In holding that the franchises, grants and rights received and enjoyed by the plaintiff in error and its predecessors in title were altered, modified and changed by the Act of April 21, 1896, and that thereafter said franchises, grants and rights were not transferable and assignable without the consent of the State of Ohio and the said Village of Orrville.

m. In holding that said assignments made by the various predecessors in title of the plaintiff in error were null and void, for the reason that the consent of the State of Ohio and of the Village Orrville, Ohio, were not obtained.

n. In holding that the Village of Orrville, Ohio, in the ordinance and resolution passed June 18, 1923, was authorized to revoke, annul and cancel the franchises, grants and rights of plaintiff in error, for the reason that predecessors in title of plaintiff in error had failed to secure the consent of the State of Ohio and of the Village of Orrville, Ohio, to the assignments of said franchises, grants and rights.

o. In holding and interpreting said Act of April 21, 1896, as modifying, altering and changing said franchises, grants and rights of the plaintiff in error, and its predecessors in

title, in making the same nonassignable without the consent of the State of Ohio and of the Village of Orrville and as authorizing said Village of Orrville to revoke, annul and cancel the same for failure to secure such consent, all of [fol. 321] which interpretation and construction being in conflict with and contrary to the previous interpretation and construction of said Act by the Supreme Court of Ohio in the case of The Hardin-Wyandot Lighting Company vs. The Village of Upper Sandusky, 93 O. S., 428 (Decided February 15, 1916) and as affirmed by the Supreme Court of the United States, 251 U. S. 173 (Decided December 15, 1919), in that the plaintiff in error relying upon said former decision and interpretation of the law of the State of Ohio did, on or about the 29th day of October, 1921, purchase said electrical plant in the Village of Orrville, Ohio, and said franchises, grants and rights as aforesaid.

p. In refusing to hold and decide, that said Act of April 21, 1896, interpreted and construed as modifying, changing and altering said franchises, grants and rights of the plaintiff in error and its predecessors in title and making the same non-assignable and non-transferable without the consent of the State of Ohio and said Village of Orrville, impaired the obligation of the contract of the plaintiff in error under said Act of January 26, 1887.

q. In refusing to hold and decide, that the resolution and ordinance of the Village of Orrville, Ohio, passed June 18, 1921, revoking, annulling and canceling the franchises, grants and rights of the plaintiff in error for the reason that the consent of the State of Ohio and of the Village of Orrville, Ohio, had not been obtained under said Act of April 21, 1896, impaired the obligation of the contract of the plaintiff in error under said Act of January 26, 1887.

r. In refusing to hold and decide that a contract existed between the plaintiff in error and the State of Ohio under the franchises, grants and rights derived from the State of Ohio under the Act of January 26, 1887, and in refusing to hold and decide that such contract could not be impaired by any act of the legislature of Ohio passed subsequently to the acquirement of said rights, or by any act of the Village of Orrville, Ohio.

[fol. 322] All in violation of and in conflict with the provisions of Section 10 of Article I of the Constitution of the United States, and of Section 1, Article 14, of the Amendments thereto.

#### Ohio Statutes Involved

1. Sections 3454 to 3471 of the Revised Statutes of Ohio (General Code Sections 9170-9191, inclusive), relating to magnetic telegraph and telephone companies.

2. An Act of the Legislature of the State of Ohio passed January 26, 1887, entitled "An Act to supplement Sections from 3454 to 3471, inclusive, Revised Statutes of Ohio, 84 O. L., page 7.

3. An Act of the Legislature of the State of Ohio passed on the 21st day of April, 1896, entitled "An Act to Amend Sections 3471-a of the Revised Statutes of Ohio (92 O. L., 204, General Code Sections 9192 and 9194, inclusive).

[fol. 323] The record filed in this cause shows the following salient and controlling facts:

On February 1, 1892, the Village of Orrville, Ohio, passed an ordinance granting to Gans and Wilson, their associates, successors and assigns, the right and power to use the streets, alleys, lanes and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus, complete for the distribution of electricity for light, heat and power, and that in accordance with said grant the grantees erected and operated an electric light plant in the Village of Orrville for the distribution of electricity for said purposes, and they and their associates, successors and assigns continued to operate said electric light plant in said Village until January 3, 1893, when they formed, under the laws of the State of Ohio, a corporation entitled "The Orrville Light, Heat & Power Company" for the purpose of manufacturing and selling electricity in the Village of Orrville, Ohio; that said company, after its organization acquired the property and rights of the former owners of said plant.

That the plaintiff in error is a public service corporation created and organized on October 11, 1921, under the laws of the State of Ohio, for the purpose, among other things, of

furnishing, transporting and distributing to public and private buildings, avenues, lanes, squares and public places, electric light, power and energy for light, heat and power in the several municipalities, counties and governmental subdivisions of the State of Ohio.

That the plaintiff in error on or about the 29th day of October, 1921, purchased said electrical plant in the Village of Orrville, and all of said franchises, grants and rights of the Orrville Light, Heat & Power Company.

That the said Orrville Light, Heat & Power Company and its successors and assigns, including the plaintiff in error, continued to maintain and operate said electric lighting plant in the streets, alleys, lanes and public places of said [fols. 324 & 325] Village of Orrville, and to furnish electricity for street lighting and for commercial and residential purposes in said Village, with the consent and agreement of the municipal authorities thereof.

June 18, 1923, the Council of the Village of Orrville passed an ordinance repealing the granting ordinance of February 1, 1892, and also a resolution reading as follows:

Section 1. That all rights, privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including said the Ohio Public Service Company, be and the same are hereby terminated and ended.

Section 2. That the said Ohio Public Service Company is hereby notified to remove all their poles, wires, guy-wires, cross-arms, insulators and other electrical equipment now occupying the streets, lanes, alleys, avenues and public places of said Village of Orrville, Ohio, within thirty days from the receipt of a copy of this resolution.

Section 3. That a copy of this resolution be served upon said The Ohio Public Service Company by the Mayor of said Village of Orrville.

Plaintiff in error designates and requests to be printed all of the record as certified to this court, including the opinion of the Supreme Court of Ohio in said action.

C. H. Henkel and Franklin L. Maier, Attorneys for Plaintiff in Error. Of counsel: Frank M. Cobb, William C. Boyle.

Defendant in error acknowledges receipt of a copy of the above statement this 18th day of January, 1926.

State of Ohio ex Rel. Joseph O. Fritz, Prosecuting Attorney of Wayne County, Ohio, by Joseph O. Fritz, Prosecuting Attorney. L. R. Critchfield, A. H. Etling, Attys. for Deft. in Error.

[fol. 326] [File endorsement omitted.]

Endorsed on cover: File No. 31,600. Ohio Supreme Court. Term No. 877. The Ohio Public Service Company, plaintiff in error, vs. the State of Ohio ex rel. Joseph O. Fritz, prosecuting attorney of Wayne County, Ohio. Filed January 9th, 1926. File No. 31,600.

(907)



FEB 17 1927

W. C. D. B.  
W. C. D. B.**In the Supreme Court of the United States**

October Term, 1926.

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No. 210.

No. 264.

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The Ohio Public Service Company,*Plaintiff in Error,*

vs.

The State of Ohio, Ex Rel. Joseph O. Flory,  
Prosecuting Attorney of Wayne County, Ohio.

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In Error to  
The Supreme Court of the State of Ohio.

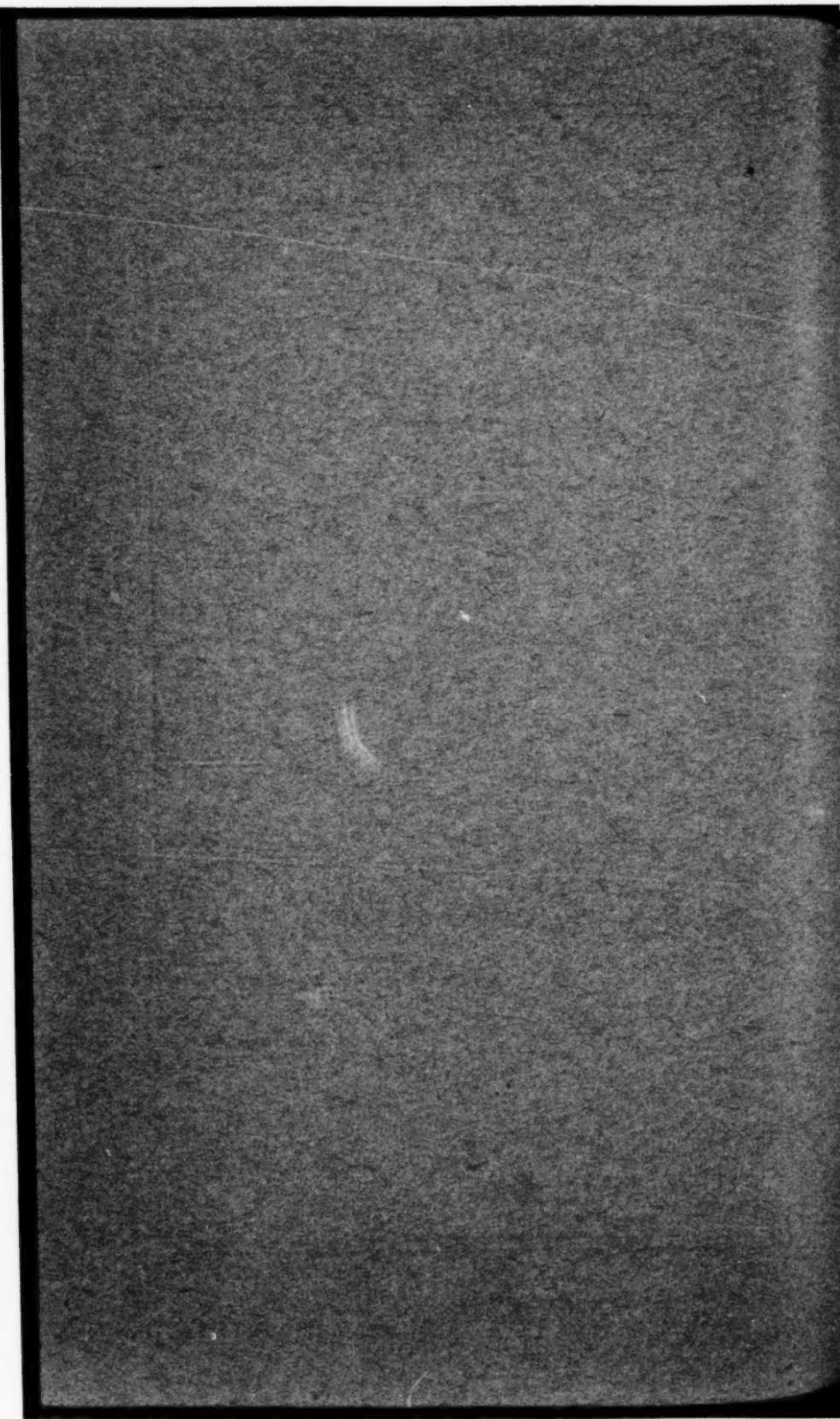
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**BRIEF OF PLAINTIFF IN ERROR.**

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Frank M. Clegg,  
Franklin L. Mears,  
C. H. Hunter,

Attorneys for Plaintiff in Error.



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# In the Supreme Court of the United States

OCTOBER TERM, 1926.

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No. 210.

No. 264.

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THE OHIO PUBLIC SERVICE COMPANY,

*Plaintiff in Error,*

vs.

THE STATE OF OHIO, EX REL. JOSEPH O. FRITZ,  
PROSECUTING ATTORNEY OF WAYNE COUNTY, OHIO.

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IN ERROR TO  
THE SUPREME COURT OF THE STATE OF OHIO.

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## BRIEF OF PLAINTIFF IN ERROR.

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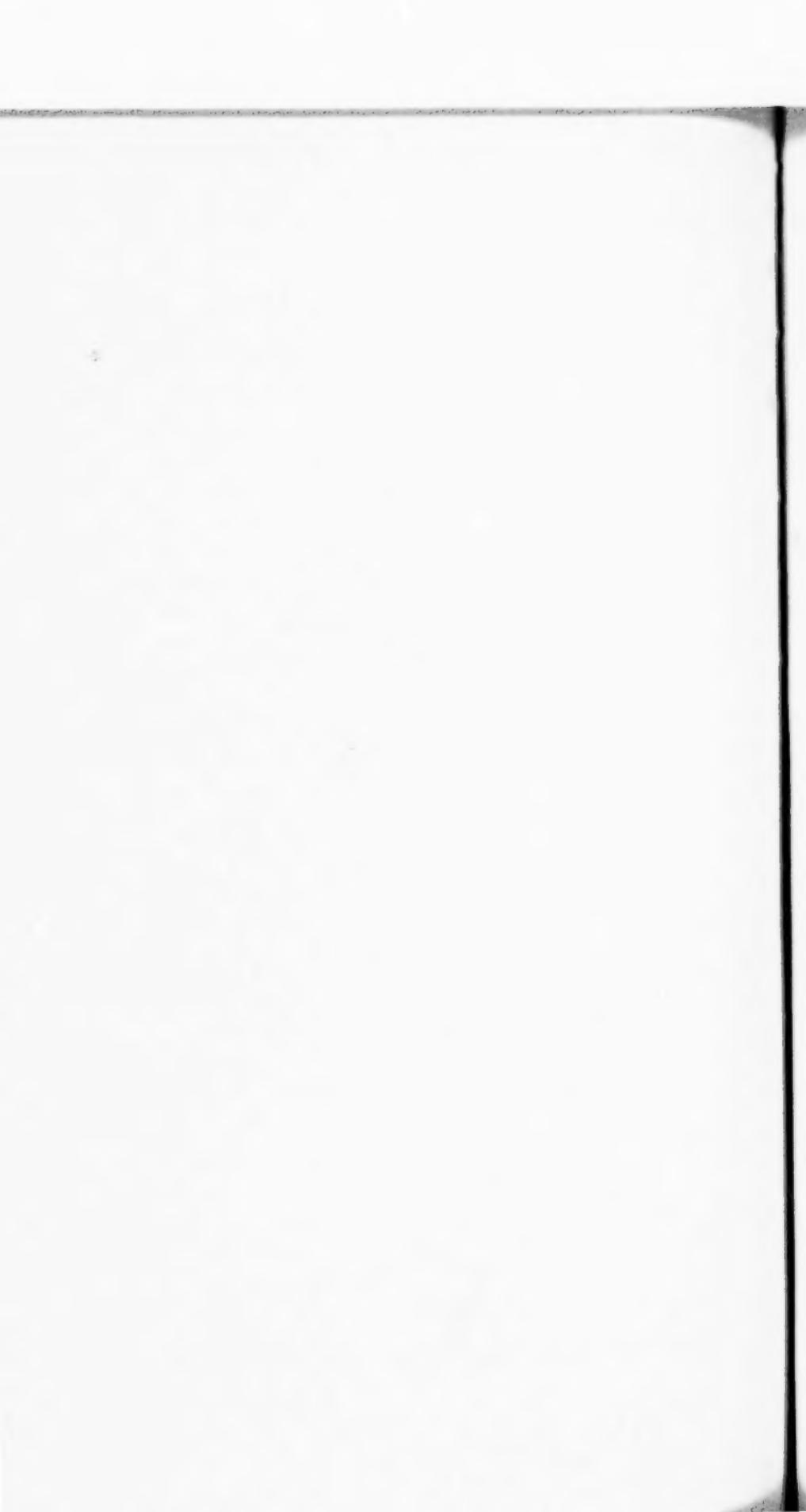
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*Attorneys for Plaintiff in Error.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1926.

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No. 210.

No. 264.

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THE OHIO PUBLIC SERVICE COMPANY,

*Plaintiff in Error,*

vs.

THE STATE OF OHIO, EX REL. JOSEPH O. FRITZ,  
PROSECUTING ATTORNEY OF WAYNE COUNTY, OHIO.

---

IN ERROR TO

THE SUPREME COURT OF THE STATE OF OHIO.

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## **BRIEF OF PLAINTIFF IN ERROR.**

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This cause comes into this Court upon error to the Supreme Court of Ohio to reverse and set aside the judgment of that court, affirming the judgment of the Court of Appeals of Wayne County, Ohio. The judgment of the Court of Appeals was in favor of the defendant in error.

Proceedings in *quo warranto* were begun by the State of Ohio ex rel. Joseph O. Fritz, prosecuting attorney of Wayne County, defendant in error, against the plaintiff in error, to oust the plaintiff in error from the use of the streets, avenues, and public places of the Village of Orrville, Wayne County, Ohio, for the erection and maintenance of its poles, wires and electrical equipment in the conduct of its business of furnishing electricity for com-

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\* References to the Record are to Transcript of Record in No. 264, October Term 1926, unless otherwise specified.

mercial and private lighting purposes to the private individuals, firms and corporations of said Village.

The answer of the respondent in said quo warranto proceedings was that it had succeeded to by various assignments, and was the owner of said poles, wires, guy wires and electrical equipment constituting the electrical lighting plant situated in said Village; that it had succeeded to and was the owner of franchises authorizing it to carry on the business of furnishing electricity for public and private purposes in said Village; that it had expended large sums in the construction of said plant and in providing electric service for said Village and its inhabitants; that its right to use the streets of said Village had been granted to it by the State of Ohio and by said Village; that such rights had never been terminated, relinquished or annulled, and that it was entitled to the full use and enjoyment of the same.

The respondent in said answer further alleged that the action of the State of Ohio and of the Village of Orrville seeking to deprive the respondent of the further use and enjoyment of its right in said Village will impair the obligation of the grant and contract received from the State of Ohio and from the Village of Orrville, contrary to and in violation of the provisions of the Constitution of the United States of America, especially Article 1, Section 10, thereof, and Section 1 of the XIV Amendment thereto.

The judgment of the Court of Appeals was that the respondent was exercising the franchise of carrying on the business of furnishing commercial and private lighting in the Village of Orrville, Wayne County, contrary to and without the authority of the laws of the State of Ohio, and contrary to and without authority from said Village, and that the respondent be ousted of said franchise and privilege of carrying on said business within said Village. (R. 28)

The judgment of the Court of Appeals was affirmed by the Supreme Court of Ohio (R. 116, 117) *Ohio Public Service Co. vs. The State ex rel. Fritz, Pros. Atty.*, 113 O. S., 325.

### STATEMENT.

The claim of the plaintiff in error is that its franchise and right to carry on the business of furnishing commercial and private lighting in said Village of Orrville is based upon two separate and distinct grants as follows:

- (a) From the State of Ohio under the Act of January 26, 1887, (84 O. L. 7) directly granting such right; and
- (b) Under an ordinance of the Village of Orrville passed February 1, 1892;

and that as both said statute and said ordinance are silent as to the duration of said grants, the same are perpetual.

#### **The State Franchise.**

The Act of January 26, 1887, (84 O. L. 7, Sec. 3471-a Revised Statutes of Ohio, Sec. 9192 General Code of Ohio) which made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies, (Secs. 3454 to 3471, Revised Statutes) granted to such companies and to The Orrville Light, Heat and Power Company, upon its incorporation on January 3, 1893, directly from the State, the right to occupy and use the public highways of the Village of Orrville.

#### **The Village Franchise.**

The ordinance of the Village of Orrville, passed February 1, 1892, granted to Aurel P. Gans and Mellville D. Wilson, their associates, successors and assigns the right to use the streets, lanes, alleys and avenues of the Village of

Orrville for the purpose of erecting, maintaining and operating electric light mains and apparatus for the distribution of electricity for light, heat and power. (R. 21, 23, 175, 177.)

The original plant was constructed in the year 1892 by said Gans and Wilson and their associates, David King and J. A. Wagner (R. 48), and was sold by them, together with all of their rights and franchises to conduct business in said Village, to The Orrville Light, Heat and Power Company after its incorporation in 1893, (R. 56, 57, 136, 137). Thereafter The Orrville Light, Heat and Power Company proceeded to conduct said business in said Village until July 1, 1907, when it sold and assigned to D. I. Renneckar all of its property and franchises in said Village (R. 41, 60, 62, 133-135). On March 11, 1913, D. I. Renneckar assigned and transferred said property and franchises to The Massillon Electric and Gas Company, (R. 41, 60, 61, 129-132). On October 29, 1921, The Massillon Electric and Gas Company sold and assigned to the plaintiff in error, The Ohio Public Service Company, all of said property and franchises in said Village, (R. 40, 120-126).

**The Act of April 21, 1896,  
Impaired the State Grant.**

The Supreme Court of Ohio in the case at bar held that the Act of April 21, 1896, (92 O. L. 205) which amended Sec. 3471-a, Revised Statutes, under which said State franchise was granted, specifically prohibited the grantee of said franchise from transferring or assigning the same without the consent of the Village of Orrville (R. 206). Although the 1896 amendment did not in express language refer to transfers or assignments of franchise rights, but merely provided

“that in order to subject the same to municipal control alone, no person or company shall place, string, con-

struct or maintain any line, wire, fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town without the consent of such municipality. \* \* \*"

yet the Supreme Court placed such construction upon said Act. Furthermore, the Court held that the transfer and assignment of said franchise by the original grantee was void because the consent of the Village was not obtained thereto, (R. 207, 208, 209, 210, 211).

### **The Municipal Legislation Impairing the Franchise.**

On June 18, 1923, the Village of Orrville passed a resolution (R. 24) which in part reads as follows:

"Sec. 1. That all rights, privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including said The Ohio Public Service Company, be, and the same are hereby, terminated and ended.

"Sec. 2. That the said The Ohio Public Service Company are hereby notified to remove all of their poles, wires, guy wires, crossarms, insulators and other electrical equipment now occupying the streets, lanes, alleys, avenues and public places of said Village of Orrville, Ohio, within 30 days from the receipt of a copy of this resolution."

On June 18, 1923, the Council of the Village of Orrville passed an ordinance (R. 25) which in part reads as follows:

"Sec. 1. That an ordinance providing for electric light, heat and motive power in the Village of Orrville, Wayne County, Ohio, passed and adopted February 1, 1892, and recorded in Volume 1, page 32, of the Ordinance Records of said Village be and is hereby repealed."

**The Decisions of the State Courts  
Sustained the State Statutes.**

On September 4, 1924, in said quo warranto proceedings, the Court of Appeals made the following finding and order (R. 28):

“the Court find that the defendant, The Ohio Public Service Company, has as alleged, exercised franchise and privilege of carrying on business and furnishing commercial and private lighting in the Village of Orrville, Wayne County, Ohio, contrary to and without the authority of the laws of the State of Ohio, and contrary to and without authority of said Village of Orrville,

“Therefore, it is ordered and decreed that said company be and it is hereby ousted of said franchise and privilege of carrying on said business within the Village limits of the Village of Orrville, as aforesaid;  
\* \* \*,”

On June 2, 1925, said judgment of the Court of Appeals was affirmed (R. 116). On June 29, 1925, application for rehearing by the plaintiff in error was filed, and on October 10, 1925, said application for rehearing was denied (R. 114, 115 and 117).

The syllabus of the Supreme Court of Ohio is as follows:

“Where the contract between a municipal corporation and an electric lighting company is silent as to the duration of the franchise, such franchise is not perpetual, but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto. A municipal corporation may, therefore, voluntarily terminate its obligation under the contract and wholly withdraw therefrom (R. 200).”

Although the syllabus is silent with respect to the State franchise, yet the opinion deals with the same at length and

the judgment of the Court ousted the company of said franchise and privilege. To show that both the State grant and the Village franchise were before the Court for decision, attention is called to the following portion of the opinion (R. 203, 204).

"The relator contends that the respondent is using the streets of Orrville for commercial lighting purposes without the authority of the State or the Village. Respondent on the other hand claims that the organization of the Orrville Light, Heat & Power Company in 1893 constituted a grant from the State of Ohio to Gans and Wilson and their associates to operate and maintain a lighting system for the Village of Orrville and the inhabitants thereof, and that this grant from the State, taken together with the ordinance of February 1, 1892, created and fixed rights, which the Village, as a subsidiary of the State, had no power to destroy."

The Supreme Court of Ohio sustained the validity of said Act of April 21, 1896, and of said resolution and ordinance of the Village of Orrville passed June 18, 1923, and construed and applied the same as having the effect of annulling all of the franchises and rights of the respondent in said Village.

The holding of the Court with respect to the annulling effect of said ordinance and resolution of 1923 appears in the syllabus, which assumes that the contract is between the Village and the company.

The holding of the Court with respect to the annulling effect of said Act of 1896 appears in two opinions of said Court, (a) announced on June 2, 1925, (Case No. 210, R. 192-201), and (b) after the denial of the application for rehearing on October 10, 1925, (Case No. 264, R. 200-215).

(a) The first decision held that said Act of 1896 revoked and annulled the grant theretofore acquired from the State of Ohio. (No. 210, R. 196).

(b) The second decision held that said Act of 1896 made the grant theretofore acquired from the State of Ohio nonassignable or assignable only with the consent of the Village of Orrville, and that as such consent had never been obtained, the transfers and assignments of said State grant were null and void. (R. 207, 209). At page 209 of the record, in No. 264, the Court said:

“Was such consent given? It was not given in the charter of incorporation; it was not given in statute; and, furthermore, in the amendment of 1896 the Legislature expressly limited the right of assignment by providing that the streets of a village after that time could not be occupied by electric companies without the consent of the municipality. This amendment took effect prior to the attempted assignment to Rennicker in 1907, and hence Rennicker and his successors in operating the business were operating without the authority of the state of Ohio.

“In other words, in the amendment of 1896 the state, so far from consenting to the assignment of the right to erect and maintain electric equipment in the streets of Orrville, limited the right of such assignment, because it conditioned such maintenance thereafter upon the consent of the municipality.”

The case of the plaintiff in error is that:

(1) The franchises granted by the State of Ohio and the Village of Orrville in 1892 and 1893 are permanent and perpetual rights.

(2) Said franchises were lawfully acquired and now owned by the plaintiff in error.

(3) The ordinance and resolution of the Village of Orrville passed June 18, 1923, revoking and annulling the said franchises, impair the contract rights of the plaintiff in error and are in violation of Article I, Section 10 of the Constitution of the United States. (Petition for writ of

error, R. 100, 101. Assignments of error Nos. 5, 6, 7, 13, 14, 15, R. 105, 108, Statement of Points No. 5-b, c, f, h, i, n, q.)

(4) The final judgment of Supreme Court of Ohio giving effect and validity to the Act of April 21, 1896, making said State grant nonassignable, or assignable only with the consent of the Village of Orrville, and annulling said grant for lack of such consent, impairs the contract rights of the plaintiff in error and is in violation of Article I, Section 10 of the Constitution of the United States. (Petition for writ of error, R. 100, 101. Assignments of Error, Nos. 4, 6, 10, 11, 12, 16, 17, R. 104, 105, 106, 107, 109, Statement of Points 5-a, c, e, f, g, k, l, m, o, p.)

(5) The final judgment of the Supreme Court of Ohio draws in question the validity of said Act of April 21, 1896, and said resolution and ordinance of June 18, 1923; it sustained the validity of said legislative acts and gave effect thereto, by annulling or terminating the franchise rights of the plaintiff in error granted under prior legislative acts, thereby depriving plaintiff in error of its property without due process of law, contrary to Section 1, Article XIV of the Amendments to the Constitution of the United States, and thereby impairing the franchise rights of plaintiff in error, contrary to the inhibition of Article I, Section 10 of the Constitution of the United States.

#### **J U R I S D I C T I O N .**

The statutory provisions under which the jurisdiction of this Court is invoked is Sec. 237 of the Judicial Code, as amended by the Act of February 13, 1925, and particularly the following provisions thereof:

“(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, \* \* \* where is drawn in question the validity of a statute of any state, on the ground of its

being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error \* \* \*."

The date of the judgment shown on the docket and journal entries (R. 114, 116) is June 2, 1925, and the same date appears in the head-note of the decision of the Court (R. 200). These references are to the transcript of record as printed in Case No. 264, and for reasons later appearing all references to the record will be to this transcript. In addition to this record another transcript of record was filed in this case known as No. 210, October Term, 1926. The reason for the two records is that error proceedings were perfected challenging the judgment of June 2, 1925, before the application for rehearing was passed upon by the Supreme Court of Ohio (R. 114, 115, 116, 117).

**The Final Judgment is the  
Order Entered Oct. 10, 1925,  
Denying the Application for Rehearing.**

The attention of the Court is particularly called to this matter not only as bearing upon the time limit for applying for the petition in error, but also on account of the fact that *the opinion actually handed down June 2, 1925, (Record in Case No. 210, pages 192 to 201) is radically different from the opinion handed down after the denial of the application for rehearing on October 10, 1925 (R. 264, pp. 200 to 215)*. An examination of these two opinions and of the application for rehearing will show beyond question that such application was entertained and considered by the Court.

The settled rule of this Court is that, if the motion or application for a rehearing is made within the proper time, and is entertained and considered by the Court, the time

limit for filing the petition in error does not begin to run until such motion or application is disposed of. *Northern Pacific Railroad vs. Holmes*, 155 U. S. 137; *Kingman vs. Western Mfg. Co.*, 170 U. S. 675; *Andrews, Administratrix vs. Virginian Railway Co.*, 248 U. S. 272; *Chicago, etc. Railroad vs. Basham*, 249 U. S. 164; *Aspen Mining & Smelting Co. vs. Billings*, 150 U. S. 36; *Voorhees vs. Noy*, 151 U. S. 135.

The application was filed on June 29, 1925, within the 30 days prescribed by Rule XX of the Rules of Practice of the Supreme Court of Ohio (113 O. S. Preface p. LXXXVI) as follows:

**“REHEARINGS.”**

“Section 1. No motion can be made or heard for rehearings—Application for a rehearing must be made within 30 days after the announcement of the decision. The application may be either printed or typewritten and 9 copies thereof filed with the Clerk, and must be confined strictly to reasons for a rehearing. No re-argument of the cause on such application will be considered.”

The opinion which was handed down by the Supreme Court after the overruling of the application for rehearing on October 10, 1925, bore the date June 2, 1925 (Record p. 200), and was not published until November 9, 1925. (Ohio Law Bulletin and Reporter, November 9, 1925, published by the Ohio Law Reporter Company, Cincinnati, Ohio.)

The syllabus, the judgment and the date of the decision as given in the head-note are identical in the two decisions, but the discussion of the State franchise, the question whether it was revocable or assignable, and the reasons given and arguments made to sustain the position of the Court with respect to said State franchise, wholly differ in the two opinions. The first opinion disposed of the State franchise on the theory that it was revocable and that the

Act of 1896 revoked the same. The second opinion expressly held that said Act could not constitutionally and did not revoke the State franchise, but held that such franchise was non-transferable without the consent of the Village. Furthermore, the first opinion paid little or no attention to the decisive case of the *Hardin-Wyandot Lighting Co. vs. The Village of Upper Sandusky*, 93 O. S. 428, and did not even mention that the decision in that case had been interpreted and restrained by this Court in 251 U. S. 173. In the second case the Court discussed the *Hardin-Wyandot* case at length and following the holding in that case held that the Act of 1896 was not retroactive and did not affect the State grant theretofore given. The second opinion, however, did hold that said Act of 1896 made such State grant non-assignable. And it is on account of this change in the holding of the Court with respect to the State grant that it becomes important to determine whether the final judgment is that of June 2, 1925, appearing in Case No. 210, page 192, or that of October 10, 1925, appearing in Case No. 264, page 200.

The two opinions when compared show beyond question that something had disturbed the mind of the Court and that a new point of view on the case had been presented to the Court which called for consideration and an answer, and although the Supreme Court of Ohio did not see fit to acknowledge that it was due to the presentation of the matter in the application for rehearing, yet no one could examine such application for rehearing and the two opinions without coming to the conclusion that such application was as a matter of fact entertained and considered by the Court. Therefore, the final judgment to which the writ of error lies is the order denying the application for rehearing October 10, 1925; or to put the matter otherwise, the period of three months within which the application for the

writ must be made runs from that date and not from June 2, 1925. (Act of February 13, 1925, c. 229, Section 8-a.) The application for the writ of error was made and allowed on December 7, 1925 (Record p. 115).

Although there seems to be no question that the record shows that the application for rehearing was entertained and considered by the Supreme Court of Ohio prior to the denial of the application for rehearing on October 10, 1925, yet lest we have erroneously interpreted the action of that Court and the meaning of the decisions of this Court upon that question, it was deemed advisable not to dismiss the first writ of error but to submit both writs to this Court for its consideration and decision.

#### **The Statutes of State Drawn in Question.**

The State statute which is drawn in question by the claims of the plaintiff in error herein is the said Act of April 21, 1896, which the Supreme Court of Ohio held as having the effect to make State franchises theretofore granted non-transferable and non-assignable without the consent of the municipality, and also the resolution and ordinance of the Village of Orrville, passed June 18, 1923, revoking and annulling the rights granted under the Ordinance of February 1, 1892. The decisions of this Court fully sustain the contention made herein that said statute of the State and said repealing resolution and ordinance of the Village are "statutes" within the meaning of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

The term "statute of any State" as used in Section 237 of the Judicial Code includes any legislative enactment of the State, whether by the Legislature itself (*St. Paul Gas Light Co. vs. St. Paul*, 181 U. S. 142, 148), or by a commission exercising delegated power (*Grand Trunk Railroad vs. Indiana Commission*, 221 U. S. 400, 403; *Lake Erie*

& Western Railroad vs. Public Utilities Commission, 249 U. S. 422, 424; *Live Oak Water Users' Assn. vs. Railroad Commission*, 269 U. S. 354), or by a board of county commissioners revoking a franchise by a resolution (*Northern Ohio Traction and Light Co. vs. Pontius*, 245 U. S. 574, 584) or by an ordinance of a municipal corporation revoking a franchise grant (*Home Telegraph & Telephone Co. vs. Los Angeles*, 227 U. S. 278; *New York Electric Lines vs. Empire City Subway*, 235 U. S. 179).

**The Writ of Error  
Runs to the Supreme Court of Ohio,  
Being the Highest Court of that State.**

The Supreme Court of Ohio acquired jurisdiction of the case upon a petition in error as of right and not upon a motion to certify (R. 113). The case was considered by the Supreme Court and the judgment below was affirmed (R. 114, 116). It, therefore, follows that the highest court of the State of Ohio passed upon the case below and that the writ of error runs to that court. *Norfolk and Suburban Turnpike Co. vs. Virginia*, 225 U. S. 264; *Stratton vs. Stratton*, 239 U. S. 55; *Second National Bank of Cincinnati vs. First National Bank*, 242 U. S. 600; *Cuyahoga River Power Co. vs. Northern Realty Co.*, 244 U. S. 300; *Mathews vs. Huwe*, 269 U. S. 262.

**The Federal Question Was Especially  
Set up and Claimed by the Company and  
Denied by the Courts Below.**

The answer in the *quo warranto* proceedings in the Court of Appeals pleads both the franchise of the Company from the State of Ohio and from the Village of Orrville, Ohio, and in praying for the dismissal of the proceedings says (Record 11):

"Wherefore respondent says that it does not usurp or without warrant or authority use of exercise any of said franchises, rights and privileges, but avers that the same have been granted to it by lawful authority and have been exercised by it with the consent and recognition and authority of the State of Ohio and the Village of Orrville \* \* \*."

Furthermore, it is alleged in said answer (R. 11):

"That the action of the State of Ohio and the Village of Orrville to deprive respondent from further use and enjoyment of its rights and to oust it from the enjoyment thereof, will impair the obligation of the contract and grant of February 1, 1892, and destroy and make worthless the value of respondent's property used and useful for furnishing electricity for light, heat and power purposes in said Village. That the action so attempted by the State of Ohio and the Village of Orrville is without authority of law and violative \* \* \* of the Constitution of the United States of America, and especially Article I, Section Ten thereof, and Section One of the Fourteenth Amendment thereto."

The Supreme Court of Ohio says in regard to the issues in the case:

"The relator contends that the respondent is using the streets of Orrville for commercial lighting purposes without the authority of the state or the village. Respondent on the other hand claims that the organization of the Orrville Light, Heat & Power Company in 1893 constituted a grant from the state of Ohio to Gans and Wilson and their associates to operate and maintain a lighting system for the village of Orrville and the inhabitants thereof, and that this grant from the state, taken together with the ordinance of February 1, 1892, created and fixed rights, which the village, as a subsidiary of the state, had no power to destroy" (Record pp. 203-4).

An examination of the opinion of the Supreme Court of Ohio shows that it has sustained the validity of said Act of April 21, 1896, with respect to the State franchise, and the validity of said ordinance and resolution of June 18, 1923, of the Village of Orrville with respect to all rights and franchises. It held that both legislative enactments were applicable to the rights claimed by plaintiff in error and resulted in the termination and annulment of such rights.

It is not necessary that the state court, in passing upon the question of the contract and in sustaining the validity of a statute impairing the same, shall expressly refer to the provisions of Article I, Section Ten of the Constitution of the United States. It is sufficient if the record shows that the decision of the federal question was necessarily involved in the case; that is, that the case could not have been determined without deciding it. *Columbia Water Power Co. vs. Columbia Elec. St. Railway*, 172 U. S. 475, 484, 489; *Yazoo & Miss. Railroad vs. Adams*, 180 U. S. 41, 48; *Merchants National Bank vs. Wehrman*, 202 U. S. 295, 299; *Rogers vs. Hennepin County*, 240 U. S. 184; *Detroit United Ry. vs. Michigan*, 242 U. S. 238. In *Eureka Pipe Line Co. vs. Hallanan*, 257 U. S. 265, it is said at page 270:

“But we must look at what the court has done, not at its mode of reaching the result. What it has done is to decide that the statute covers all the oil produced in West Virginia and that it shall be upheld in so doing. The nature of the mistake that induced the act is immaterial. A case would not be withdrawn from the jurisdiction of this court in error by a declaration that a statute was addressed only to intrastate commerce if it was applied wholly to freight passing across the continent.”

In *Dahnke-Walker Milling Co. vs. Bondurant*, 257 U. S. 282, it is said at page 289:

"Neither does it matter on what ground the court upheld and enforced the statute. The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute, the review may be on a writ of error; and if it be resolved against the validity, the review can only be on writ of certiorari. The provisions take no account of the particular grounds or reasons on which the decision is put.

"Our conclusion on the jurisdictional question is that as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error \* \* \* "

Of course, it is well settled that this Court will determine for itself whether a contract exists, and if so, whether it is impaired, independent of the construction put upon said contract or its impairment by the State courts. *Douglas vs. Kentucky*, 168 U. S. 488, 502; *St. Paul Gas Light Co. vs. St. Paul*, 181 U. S. 142, 147; *Grand Trunk Railroad vs. South Bend*, 227 U. S. 544, 551; *First National Bank vs. Anderson*, 269 U. S. 341, 346; *Detroit United Railway vs. Michigan*, 242 U. S. 238, 249; *Superior Water Co. vs. Superior*, 263 U. S. 125.

The relator claimed (1) that no franchise had been granted and/or (2) that the franchise had been forfeited by abandonment and nonuser (R. 13, 14). The Supreme Court and the Court of Appeals held against the relator on both contentions. The Court of Appeals said (R. 36, 37):

"Under the evidence in this case we do not find, as relator asks us to find, that the respondent did not acquire such rights as were granted by the ordinance of 1892, nor do we find that such rights have been forfeited by the conduct of respondent and its predecessors in title."

The Supreme Court said in reference to said judgment of the Court of Appeals as follows:

"Since the Court refused to give the judgment of ouster either upon the ground that no franchise had been given or upon the ground of abandonment and non-user, it is evident that the Court of Appeals must have found against the relator upon these questions of fact. There is evidence in the record to sustain the conclusion of the Court of Appeals upon these questions, and we therefore shall not discuss them, but shall pass directly to the main point of law involved in the case" (R. 203).

The plaintiff in error expressly set up and claimed its contract right to continue in business in the Village of Orrville, and complained of the action of the State and of said Village in abrogating such right. The decision of the Supreme Court of Ohio in affirming the judgment of the Court of Appeals had the effect of ousting the respondent from the use of the streets of Orrville, and of depriving respondent from the enjoyment of said franchise rights. The decision of the Supreme Court of Ohio, therefore, necessarily involved the federal question whether the plaintiff in error enjoyed the contracts claimed and whether such contract rights were impaired by the legislation referred to. The decision complained of disposed of the claims of the plaintiff in error adversely, and sustained the validity of the legislative acts in question.

Therefore, we submit the record plainly shows the jurisdictional grounds necessary for a review of said decision by writ of error.

**STATEMENT OF CASE.**

On February 1, 1892, the Village of Orrville, Ohio, passed an ordinance granting to Aurel P. Gans and Mellville D. Wilson, their associates, successors and assigns, the right and power to use the streets, alleys, lanes and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power, as follows, to-wit:

An Ordinance (Vol. 1, Pages 33-34-35-36) Providing for Electric Lights, Heat, and Motive Power in the Village of Orrville, Wayne County, Ohio.

Be it ordained by the Council of the Village of Orrville, and it is hereby ordained:

Sec. 1. That Aurel P. Gans and Mellville D. Wilson of Canal Dover, Ohio, their associates, successors and assigns are hereby authorized and empowered to use the streets, lanes, alleys, and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power.

Sec. 2. Said Gans and Wilson, in the construction of their plant or in conducting their wires for the distribution of electric current, shall not unnecessarily intercept or obstruct the passage of any street, alley, lane or avenue or other thoroughfare in said Village, crossing same shall not unnecessarily mutilate, cut or trim any tree or trees except for the safe conduct of said electric wires, and same shall be fully protected from any and all damages where such trimming is necessary to be done. Same shall erect said wires and poles not less than thirty feet long and placed in the ground at a sufficient depth to insure perfect safety.

Sec. 3. In consideration of the privileges hereby granted the said Gans and Wilson, their associates, successors and assigns shall furnish the Village of

Orrville on the several streets, lanes, alleys and avenues not less than twenty-five (25) electric lamps of not less than 2,000 candle power each, to be placed wherever the Council may direct in said Village of Orrville, said lamps to burn and be lighted and extinguished according to what is known as "Moonlight Schedule," until 1 o'clock and in addition then to be lighted whenever the moon is obscured and on rainy and stormy nights, whenever same occurs outside the regular lighting hours.

Sec. 4. In consideration of the construction of said electric light plant as herein provided, the Council of said Village of Orrville hereby agrees and binds itself to take and use the light of said Gans and Wilson, their associates, successors and assigns for the period of ten (10) years from and after the date upon which said light shall be first supplied and to pay same quarter-annually for said lighting a price equal to seventy-two (\$72.00) dollars per year for each and every lamp of 2,000 candle power, said lamps to be lighted and extinguished and kept in repair by and at the expense of said Gans and Wilson, their associates, successors and assigns; the total number of lamps thus supplied to be not less than twenty-five 2,000 candle power lamps—are light.

Sec. 5. Said Gans and Wilson shall commence work on said electric light plant after the passage of this ordinance at such time as to have same completed by May 1st, 1892, otherwise the ordinance will be null and void, the privilege and franchise hereby granted shall be declared forfeited and the obligations of the Village annulled.

Sec. 6. The privilege hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of said Gans and Wilson to perform any of the conditions hereby imposed where such failures are occasioned by accident, untoward events or the want of necessary repairs to the machinery or apparatus of said electric light plant,

provided such accidents be remedied and repairs made within a reasonable time and a pro rata reduction be made to the said Village of Orrville, for any loss of lighting occasioned thereby.

Sec. 7. Said Gans and Wilson agree to accept this ordinance and to notify the Council in writing of such acceptance within ten days from the passage hereof, which acceptance, together with the ordinance, shall constitute a contract, otherwise the Village shall be no longer bound thereby and said ordinance shall be void.

Sec. 8. All other ordinances heretofore passed pertaining to and providing for electric lights, heat and motive power by means of electricity, and all ordinances granting franchise for the erection and operation of electric wire mains for the distribution of light, heat and motive power are hereby repealed.

Passed and adopted February 1, 1892.  
(R. 21-23-175-177.)

In May, 1892, the Grantees under said ordinance had erected and completed an electric light plant in said Village of Orrville for the distribution of electricity, and thereupon said plant was put in operation and used for the general distribution of electricity in said Village and for the lighting of the streets thereof by electric arc lamps. (R. 4, 15, 24, 48, 57.)

On January 3, 1893, J. A. Wagner and David King and other associates of said Aurel P. Gans and Mellville D. Wilson, incorporated under the laws of the State of Ohio, The Orrville Light, Heat and Power Company, the articles of incorporation of which provide, in part:

“Second. Said corporation is to be located at Orrville in Wayne County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of lighting the Village of Orrville in Wayne

County, Ohio, by electricity and to furnish heat and power for other manufacturing purposes." (R. 42, 56, 136, 137.)

Said Company, after its organization, acquired all of the plant, property and rights of said Gans and Wilson and their associates, and continued the operation of said plant for commercial and private lighting, as well as the lighting of the streets of the Village. (R. 48, 56, 57)

The statutes in force at the time the said ordinance was passed in 1892 and when said Company was incorporated in 1893, providing for the granting of franchises to electric lighting companies, were Sections 3454 to 3471a Revised Statutes (now Sections 9170 to 9193 General Code).

The Act of January 26, 1887 (84 O. L. 7) made the provisions of the chapter relating to magnetic telegraph companies, to-wit: Secs. 3454 to 3471 R. S., applicable to electric light and power companies, by the enactment of Section 3471a as follows:

**SENATE BILL NO. 37.**  
**AN ACT**

To supplement sections from 3454 to 3471, inclusive,  
of the Revised Statutes of Ohio.

**SECTION 1.** Be it enacted by the General Assembly of the State of Ohio, That the following section shall constitute a section supplementary to sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio, with sectional numbering as follows:

**ELECTRIC LIGHT COMPANIES; LAWS MADE  
APPLICABLE TO.**

**SEC. 3471a.** The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public

places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.

SECTION 2. This act shall take effect and be in force from and after its passage.

JOHN C. ENTREKIN,  
*Speaker of the House of Representatives,*

S. A. CONRAD,  
*President pro tem. of the Senate.*

Passed January 26, 1887.

The provisions of Sections 3454 and 3461 Revised Statutes (now secs. 9170 and 9178 General Code) are as follows:

SEC. 3454. (*Powers of companies*) A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommod the public in the use of such road. (50 v. 274 @ 47; S. & C. 299)

SEC. 3461. (*How right to use public ground acquired.*) When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommod the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any

compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness. (62 v. 72, @ 5; S. & S. 154)

The mode of use of the streets, alleys and public ways within the Village of Orrville, Ohio, was agreed upon between the municipal authorities of said Village and said Gans and Wilson, their associates and assigns, (1) by the ordinance of February 1, 1892, and (2) by permits granted for the erection of the necessary poles and other equipment in the highways. The reply of the Relator admits that there was no objection to the use of the streets until after July 15, 1917, saying (R. 15):

“The Relator admits that the respondent and its predecessors had open and notorious use and enjoyment of the streets of said Village from 1892 to July 15, 1917, but avers that there was objection to the manner of service in said streets long prior to July 15, 1917, and after 1912, and that there was objection to use of said streets after July 15, 1917.”

In the agreed statement of facts the Relator admits (R. 43) that Aurel P. Gans and Mellville D. Wilson after February 1, 1892 operated and exercised the rights granted in the ordinance passed by the Council of the Village of Orrville on said date.

Furthermore, said resolution of June 18, 1923, although undertaking to forfeit and annul all of the rights and privileges granted to said Gans and Wilson, recognized that the rights so granted and the use of the streets thereunder continued to the 15th day of July, 1917, using this language (R. 23):

“The Council of the Village of Orrville, Ohio not waiving their claims that said rights, privileges and franchises granted to Aurel P. Gans and Mellville D. Wilson, their associates, successors and assigns, in-

cluding The Ohio Public Service Company, ceased and terminated on the 15th day of July, 1917 \* \* \*."

The Supreme Court of Ohio said with respect to the right to operate in the streets of the Village and the consent of the Village (R. 211):

"This consent was given to The Orrville Light, Heat and Power Company and to its successors, Renneckar, by the Village in the contract ordinances, but was never given to The Massillon Electric and Gas Company. It is true that the City acquiesced in the exercise of these rights by The Massillon Electric and Gas Company until the end of the last five-year contract, and hence can not attack the exercise of those rights during that period; but all of its rights ceased in 1917 at the expiration of the last five-year contract. The Massillon Electric and Gas Company succeeded only to the right of Renneckar, and those rights expired in 1917 and The Massillon Electric and Gas Company had thereafter no right which it could transfer to The Ohio Public Service Company under the laws of the State of Ohio."

It is not disputed in the Record that the Village of Orrville agreed and consented to the construction of the wires, fixtures and appliances in the streets and public places of the Village of Orrville, which were constructed by Gans and Wilson, and their associates. The Record in no place shows that there was any disagreement as to the mode and manner of the use of the streets; that is, with respect to the location of the poles, or the type of the construction of the appliances, or with respect to any other matter which might incommode the public in the use of such streets.

On June 16, 1902, the Village of Orrville passed an ordinance accepting the proposition submitted by The Orrville Light, Heat and Power Company to furnish the village for a period of five years, from the 15th day of July, 1902,

certain electric arc lamps on the several streets of the Village (R. 12, 13, 181, 182).

On November 19, 1906, the Council of the Village of Orrville passed an ordinance accepting the proposition submitted by The Orrville Light, Heat and Power Company to furnish to the Village for a period of five years, from the 15th day of July, 1907, certain new electric arc lamps on certain streets of the Village. (R. 13, 15, 184, 186).

On July 1st, 1907, The Orrville Light, Heat and Power Company sold and assigned said plant and all of its business and franchises in said Village to D. I. Renneckar (R. 41, 60, 62, 133, 135).

On March 12, 1910, the Council of the Village of Orrville passed an ordinance accepting the proposition submitted by D. I. Renneckar to furnish to the Village for a period of five years, from July 15, 1912, certain electric arc lights on certain streets of the Village. (R. 12, 13, 188, 190)

Said ordinances passed June 16, 1902, November 19, 1906 and March 12, 1910, in addition to providing for lighting of the streets by arc lamps, also fixed the prices to be charged for furnishing light for full commercial lighting in said village. The provisions are contained in Section 4 of said ordinances and are substantially similar to that contained in the ordinance of March 12, 1910, which reads as follows:

SECTION 4. Said D. I. Renneckar shall furnish light for full commercial lighting in said Village to the citizens thereof at a price not to exceed seven and one-half cents per kilowatt hour meter rate."

The original grantees and all parties claiming under them at all times claimed and believed said grant in Section 1 of Ordinance Feb. 1, 1892 to be of a perpetual nature, (R. 49, 50, 59, 61, 63, 65) and relying thereon they

expended money and also made investments in property. (R. 89)

The Orrville Light, Heat and Power Company directly and through D. I. Renneckar transferred and conveyed all the property and franchise rights aforesaid to The Massillon Electric and Gas Company in 1913, a joint application having been filed by The Orrville Light, Heat and Power Company and The Massillon Electric and Gas Company with the Public Utilities Commission of Ohio as provided by law, asking for the purchase and sale of the property of The Orrville Light, Heat and Power Company, which consisted of all the necessary poles, wires, equipment and machinery for the operation of the light, heat and power plant in said Village of Orrville, and also all rights, privileges and franchises belonging to and used by The Orrville Light, Heat and Power Company (R. 41, 128, 129); and the Public Utilities Commission of Ohio did make an order on or about the 23rd day of October, 1912, authorizing The Orrville Light, Heat and Power Company to sell and The Massillon Electric and Gas Company to purchase said plant of The Orrville Light, Heat and Power Company and all the assets and the entire property thereof, including all privileges, rights, grants and franchises; and in accordance therewith D. I. Renneckar on behalf of and as the successor to The Orrville Light, Heat and Power Company did convey on March 11, 1913 to The Massillon Electric and Gas Company all of the property and the entire assets of The Orrville Light, Heat and Power Company, including the franchises, rights and privileges aforesaid. (R. 129, 133 and 134)

On or about the 29th day of October, 1921, The Ohio Public Service Company being duly authorized so to do by the Public Utilities Commission of Ohio, purchased from The Massillon Electric and Gas Company all the right, title and interest of The Massillon Electric and Gas

Company in and to those franchises, rights and privileges in the Village of Orrville and especially all the right, title and interest in and to the franchise granted to Aurel P. Gans and Mellville D. Wilson, their associates and assigns, on February 1, 1892. (R. 40, 120, 124 and 126)

On July 1, 1907, at the time said D. I. Renneckar acquired said plant, he executed a mortgage to J. A. Wagner and H. W. Enek upon said property. (R. 45) And at the time of the sale of said plant to the plaintiff in error, The Massillon Electric and Gas Company had a mortgage of \$533,000 on this and other properties of the Company. (R. 124) After the purchase of this property, the plaintiff in error executed and delivered a mortgage and a supplemental mortgage upon this and other properties. (R. 41, 41).

After The Massillon Electric and Gas Company acquired said plant in 1913, the Village Council decided to issue bonds for the purpose of erecting a municipal electric light plant, and in February, 1914 entered into a contract with The Dravo-Doyle Company for the construction of the same. Thereupon, in March, 1914, The Massillon Electric and Gas Company in its capacity as owner of an electric plant and also as a tax payer, commenced two suits against the Village of Orrville in the Common Pleas Court of Wayne County, Ohio, being Nos. 24,440 and 24,458, which, upon appeal, were known as Nos. 637 and 638 in the Court of Appeals. (R. 42, 43, 156, 162).

These actions were brought to enjoin the Village from erecting said plant upon the ground that the village had no power to do so unless and until it had complied with Section 3990 of the General Code of Ohio. This section provided that if in any village there was an electrical plant erected by any company " \* \* \* to whom a franchise to erect and operate gas and electric works has been granted and such franchise has not yet expired \* \* \* " the village

must purchase or appropriate the Company's plant. The petition of the Company alleged that it owned, operated and maintained an electric works in the said Village under an existing franchise, and that such franchise was still in effect. (R. 156, 162).

The Court of Appeals found on the issues joined for the plaintiff and entered up a perpetual injunction against the building of said plant. (R. 162, 167). In the opinion of the Court of Appeals, it is said:

"The petition in case No. 638 contains the necessary averment that the plaintiff is the owner of said electric light works in the Village of Orrville under a franchise granted by said Village. No defense is made that the franchise has terminated \* \* \*. We are of the opinion \* \* \* that the defendant, the Village of Orrville, having failed to either purchase or condemn the property of the plaintiff, its action is without authority of law and the injunction allowed should be made perpetual \* \* \*."

This decree ended the litigation between The Massillon Electric and Gas Company and the Village of Orrville, as no appeal or error proceedings was taken to reverse said judgment.

However, The Dravo-Doyle Company, the contractor which built the plant, brought an action against the Village upon its contract, and the Village of Orrville in its Answer set up the foregoing litigation with the Company as its defense. (R. 156, 162). In its Answer, the Village said (R. 161):

"Further answering, this defendant says that on the 21st day of July, 1913 The Massillon Electric and Gas Company did in fact own and was operating an electric light plant in said Village of Orville under a franchise duly granted to it, and that said franchise had not then expired, and that said The Massillon Electric and Gas Company was then supplying from said plant electricity to the Village of Orrville and

the inhabitants thereof, for lighting and power purposes both public and private; that no effort to purchase from the said The Massillon Electric and Gas Company its said plant was made by the Village of Orrville, or any of its officers, on or at any time prior to the 17th day of November, 1912, and by reason thereof and because of the provisions of Section 3990 of the General Code of Ohio, this defendant, the Village of Orrville, was without power or authority to construct a municipal electric light plant."

The judgments in the Common Pleas Court and in the Court of Appeals were in favor of the Village. The Supreme Court reversed said judgments. The court said at page 244, with reference to the franchise of The Massillon Electric and Gas Company, as follows:

(*Dravo-Doyle Co. vs. Village of Orrville*, 93 O. S. 236, 244)

The franchise was granted in 1892 and fixed the contractual rights and duties of the parties. The statute then in force provided that the council of any city or incorporated village should have power "whenever it may be deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase any gas-works already erected therein."

Although The Massillon Electric and Gas Company was not a party in the *Dravo-Doyle* case, yet in the prior litigation with the Village there was a final adjudication, that as of September 25, 1914, The Massillon Electric and Gas Company owned and operated a plant for supplying electricity for lighting and power purposes in said Village for public and private use, under a franchise which was still in full force and effect. The existence of such a franchise and that it was still in effect were facts which the court had to find in favor of the company in order to give the relief in question. The Village recognized and

accepted this situation by the defense made by it in the *Dravo-Doyle* case.

On April 2, 1923, about two years after plaintiff in error acquired said plant, proceedings in quo warranto were commenced in the Court of Appeals in Wayne County, Ohio, on relation of Joseph O. Fritz, Prosecuting Attorney against the plaintiff in error to oust it from the exercise of said franchises in said Village, which action was dismissed on the motion of the relator therein.

On June 18, 1923, the Council of the Village of Orrville passed a resolution notifying the plaintiff in error of the termination of said franchises, and notifying the plaintiff in error to remove its poles, lines and equipment from the streets, alleys, avenues and public places of said Village (R. 23, 24); and the Council also on said 18th day of June, 1923, passed an ordinance repealing said ordinance of February 1, 1892 (R. 25). Said resolution reads as follows:

**RESOLUTION.**

Notice to the Ohio Public Service Company of termination of franchise granted February 1, 1892, to Aurel P. Gans and Mellville D. Wilson, their associates, successors, and assigns, and to remove its poles, lines and equipment, wires, guy wires, cross-arms, and all electrical equipment from the streets, lanes, alleys, avenues, and public places of the village of Orrville, Ohio.

The Council of the Village of Orrville, Ohio, not waiving their claim that said rights, privileges and franchises granted to Aurel P. Gans and Mellville D. Wilson, their associates, successors and assigns, including The Ohio Public Service Company, ceased and terminated on the 15th day of July, 1917, and not waiving the claim of said Village of Orrville that said associates, successors and assigns of said Gans and Wilson, including said The Ohio Public Service Company, have forfeited all rights, privileges and franchises granted by an ordinance of the Village of Orr-

ville, Ohio, passed on the first day of February, 1892, and recorded in Volume I, page 32, of the Ordinance Records of said Village of Orrville, by reason of the abandonment of said rights, privileges, and franchises and by not performing the terms and conditions of said franchise; and

Whereas, The Ohio Public Service Company claim to be the successors of Aurel P. Gans and Mellville D. Wilson to all the rights, privileges and franchises granted to said Gans and Wilson, by virtue of said ordinance of the Village of Orrville, passed on the first day of February, 1892, and recorded in Volume I, page 32, of the Ordinance Records of said Village of Orrville, Ohio; and

Whereas, said ordinance does not specify the length of duration of said franchise; and

Whereas, said ordinance has been repealed by said Council;

Now, Therefore, be it resolved by the Council of the Village of Orrville, State of Ohio;

Section 1. That all rights, privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including said The Ohio Public Service Company, be and the same are hereby terminated and ended.

Section 2. That the said The Ohio Public Service Company are hereby notified to remove all of their poles, wires, guy wires, cross arms, insulators and other electrical equipment now occupying the streets, lanes, alleys, avenues, and public places of said Village of Orrville, Ohio, within thirty (30) days from the receipt of a copy of this resolution.

Section 3. That a copy of this resolution be served upon said The Ohio Public Service Company by the Mayor of said Village of Orrville.

E. L. KINNEY, *Mayor.*

Attest: A. JENNY, *Clerk.*

Passed June 18, 1923.

Said Ordinance (R. 25) reads as follows:

## ORDINANCE.

Repealing an ordinance providing for electric light, heat and motive power in the village of Orrville, Wayne County, Ohio, said ordinance passed February 1st, 1892, and recorded in Volume I, Page 32, of the Ordinance Records of said village.

Be it ordained by the Council of the Village of Orrville, State of Ohio, and it is hereby ordained:

Sec. 1. That an ordinance providing for electric light, heat and motive power in the Village of Orrville, Wayne County, Ohio, passed and adopted February 1, 1892, and recorded in Volume I, Page 32, of the Ordinance Records of said Village, be and is hereby repealed.

Sec. 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed June 18, 1923.

E. L. KINNEY, *Mayor.*

Attest: A. JENNY, *Clerk.*

After receipt of such notices the plaintiff in error sent a communication to the said village insisting upon its rights to use the streets and public places of said village and of exercising the privileges granted by the ordinance of February 1, 1892. (R. 140, 141)

On July 21, 1923, the case at bar was commenced. (R. 3, 4).

On September 4, 1924, said Court of Appeals entered judgment in favor of the Relator and ordered and decreed that the plaintiff in error be ousted of its franchise and privilege of carrying on business within said village. (R. 28) And this judgment of the Court of Appeals was affirmed by the Supreme Court of Ohio. (R. 113, 117).

The judgment of the Supreme Court of Ohio was predicated upon the proposition that the plaintiff in error, and its predecessors in title, had acquired certain franchises and privileges to use the streets of the Village of Orrville, and that said franchises and privileges had not been abandoned or forfeited for non-user. (R. 203), but that all of said franchises and privileges, whether derived from the State of Ohio or from said Village, had been terminated and annulled by said resolution and ordinance of June 18, 1923, and the construction put upon the Act of April 21, 1896, making the state franchise non-assignable. The Supreme Court of Ohio sustained the validity of said Act of April 21, 1896 and of said resolution and ordinance of the Village of Orrville passed June 18, 1923, and construed and applied the same as having the effect to terminate and annul all of the franchises and rights of the plaintiff in error in the Village of Orrville.

We contend on behalf of the plaintiff in error as follows:

1. That by virtue of the ordinance passed by the Village Council on February 1, 1892, there was granted to Gans and Wilson, their associates, successors and assigns, a franchise, indefinite as to time and therefore perpetual, to do the very things plaintiff in error is now doing in said Village, thereby establishing a contractual relationship between the municipality and utility, which franchise and contractual rights were acquired and are now owned and controlled by plaintiff in error under proper recognition and approval on the part of The Public Utilities Commission of Ohio, and which franchise, together with the authority derived directly from the State itself at the time said franchise ordinance was granted, fully provides the warrant by which plaintiff in error now enjoys the rights and privileges from which the defendant in error seeks to oust it.

2. That constantly since February 1, 1892, the Council of the Village of Orrville has recognized the right of the plaintiff in error and its predecessors in title and interest, by establishing numerous contractual relationships on the basis thereof, and by admission and estoppels contained in its legislative enactments and in judicial proceedings, so that it would not, after a lapse of more than thirty-two years, be unconscionable to permit a denial of such recognized rights.
3. That the plaintiff in error is a corporation duly organized under and by virtue of the laws of the State of Ohio as a public utility and properly authorized by the State of Ohio to operate as such in providing electricity for private and public consumption; and that no order requiring it to abandon its franchise rights in the territory to which the same applies has been made by the Public Utilities Commission of Ohio.
4. That the plaintiff in error has not voluntarily abandoned any portion of its franchise or done any act to justify the forfeiture of its rights thereby granted.
5. That the act of January 26, 1887 (84 O. L. 7) made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies, and granted to The Orrville Light, Heat and Power Company, upon its incorporation on January 3, 1893, directly from the State of Ohio, the right to occupy and use the public highways of the Village of Orrville.
6. That the final judgment rendered in the Supreme Court of the State of Ohio impairs the obligation of the contract made between the State of Ohio and The Orrville Light, Heat and Power Company, the predecessor in title to the plaintiff in error under and pursuant to the act of January 26, 1887, granting to said Company the franchise

and right to use the public streets in the Village of Orrville for the transaction of the business for which it was incorporated to furnish electric light, heat and power to said Village and its inhabitants, and the consent and agreement by the authorities of the Village of Orrville, Ohio, as expressed in the ordinance of February 1, 1892, relative to the mode and manner of the use of the streets, alleys, lanes, squares and public places in said Village by the equipment necessary for said service, which contract, grant, franchise and right was acquired for a valuable consideration by plaintiff in error in 1921, and is now owned by the plaintiff in error.

7. That after the State of Ohio has granted the right above enumerated and the Village of Orrville had consented to the mode and manner of the occupancy of the streets of said Village by the predecessors of the plaintiff in error, neither the State legislature could pass an act revoking or in any way abridging or annulling the property rights and contracts granted by it, nor could the Village of Orrville by legislative action of its Council in any way modify, terminate, abridge or annul the contract derived from the incorporation of The Orrville Light, Heat and Power Company and the passage of the ordinance of February 1, 1892, and that to give to the act of 1896 such an effect or to recognize the ordinance and resolution of June 18, 1923, on the part of the Village Council would constitute action confiscatory in nature and alike repugnant to Section 10 of Article I of the United States Constitution and to Section 1 of the 14th Amendment thereto.

8. That the grant of said franchise rights, being silent as to duration, such rights are perpetual and cannot be terminated at the will of the granting power.

## ASSIGNED ERRORS RELIED UPON BY PLAINTIFF IN ERROR.

All of the assignments of error relied upon by plaintiff in error complain of the judgment of the Supreme Court of Ohio as giving validity to state legislation which impairs contract rights of the plaintiff in error in violation of Section 10 of Article I of the Constitution of the United States and of Section 1 of the Fourteenth Amendment thereto.

The contract rights are based upon two separate and distinct grants:

- (a) From the state of Ohio under the Act of Jan. 26, 1887 (84 O. L. 7) directly granting the rights in the streets; and
- (b) Under the ordinance of the Village of Orrville passed February 1, 1892, granting such rights.

The legislation which impairs such contract rights is:

- (a) The Act of April 21, 1896 (92 O. L. 204); and
- (b) The Resolution and Ordinance of the Village of Orrville passed June 18, 1923.

(1) The assignments of error which relate to the impairment of the state grant by said Act of 1896 are as follows:

“4. The Supreme Court of Ohio erred in holding that the franchises, grants and rights of your petitioner and its predecessors in title acquired from the State of Ohio under an Act of the Legislature of the State of Ohio passed on the 26th day of January, 1886, entitled ‘An Act to Supplement Sections 3454 to 3471, inclusive, of the Revised Statutes of Ohio’ (84 O. L. 7) were revoked, annulled and cancelled by the Act of the Legislature of said state passed on the 21st day of April, 1896, entitled ‘An Act to Amend Section 3471-a of the Revised Statutes of Ohio’ (92 O. L. 206), in violation of and in conflict with the inhibitions of

Section 10 of Article I of the Constitution of the United States with respect to the impairment of contract rights and of Section 1 of Article XIV of the Amendments thereto in regard to depriving any person of his property without due process of law."

"12. The Supreme Court of the State of Ohio erred in refusing to hold and decide that the Act of the Legislature of said State passed on the 21st day of April, 1896, entitled 'An Act to Amend Section 3471-a of the Revised Statutes of Ohio,' impaired the obligations of the contract, namely the franchises, grant and right of your petitioner acquired from the State of Ohio under Act of the Legislature of said State passed January 26, 1887, and was and is in violation of and in conflict with Section 10 of Article I of the Constitution of the United States, and of Section 1 of Article XIV of the Amendments thereto."

"16. That the said Supreme Court of the State of Ohio in said order and judgment adjudged and decided that a certain Act, passed by the General Assembly of the State of Ohio, on April 21, 1896, entitled 'An Act to Amend Section 3471-a of the Revised Statutes of Ohio' (92 O. S. 206) made said franchises, grants and rights to distribute electricity in said Village of Orrville, Ohio, as aforesaid, non-assignable without the consent of the said Village of Orrville, Ohio; and that the sales, assignments and transfers of said franchises, rights and grants by The Orrville Light, Heat & Power Company and the other predecessors in title of this petitioner, to distribute electricity in said Village of Orrville, Ohio, as aforesaid, were null and void for the reason that the said Village of Orrville had not consented thereto; and it was adjudged and decreed by said Supreme Court by its said final order and judgment herein that the said Act of April 21, 1896 of the General Assembly of the State of Ohio, as interpreted by said Court, was not in violation of, nor repugnant to the provisions of Section 10 of Article I of the Constitution of the United

States of America, nor of Section I of the 14th Amendment, thereof."

(R. 104, 107, 109. See also Statement of Points, No. 5 a, c, g, k, l and p.)

(2) The assignments of error which relate to the reliance of the plaintiff in error upon the former construction in the *Hardin-Wyandot* case, and which complain of the changed construction put upon said act in the case at bar, are assignments Nos. 10 and 11 (R. 106, 107) and assignment No. 17 (R. 109).

"10. The Supreme Court of the State of Ohio erred in interpreting said Act of April 21, 1896, as revoking and annulling the grants, franchises and rights granted by the State to your petitioner, and to the Orrville Light, Heat and Power Company, under the provisions of the Act of said Legislature passed January 26, 1887, such interpretation being in conflict with and contrary to a previous interpretation of said Act by the said Supreme Court of the State of Ohio in the case pending therein entitled '*The Hardin-Wyndot Lighting Company vs. The Village of Upper Sandusky*' (93 O. S. 428), decided February 15, 1916, by said Court, and which decision was affirmed by the Supreme Court of the United States on December 15, 1919 (251 U. S. 173) in that your petitioner, relying upon said former interpretation and its affirmance by the Supreme Court of the United States, did on or about the 29th day of October, 1921, purchase said electrical plant in the Village of Orrville and said franchise, grant and right of said The Orrville Light, Heat & Power Company; contrary to and in violation of the provisions of Section 10 of Article I of the Constitution of the United States, and of Section 1 of Article XIV of Amendments thereof."

"11. The Supreme Court of the State of Ohio erred in interpreting said Act of April 21, 1896, as giving authority to the Village of Orrville to cancel, re-

voke and annul by the passage of said resolution and said ordinance by its Council on June 18, 1923, the contract rights and franchises of your petitioner and of its predecessor in title, The Orrville Light, Heat & Power Company, granted by the State of Ohio under the Act of January 26, 1887, such interpretation being contrary to and in conflict with a former decision of said Supreme Court of Ohio in the case of *The Hardin-Wyandot Lighting Company vs. Village of Upper Sandusky* (93 O. S. 428), decided February 15, 1916, and the affirmance thereof by the Supreme Court of the United States on December 15, 1919, (251 U. S. 173) in that your petitioner, relying upon said former interpretation and its affirmance by the Supreme Court of the United States, did on or about the 29th day October, 1921, purchase said electrical plant in the Village of Orrville and said franchise, grants and rights of said The Orrville Light, Heat & Power Company; contrary to and in violation of the provisions of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the amendments thereof."

"17. That the interpretation and construction upon said Act of April 21, 1896 by the Supreme Court of Ohio in holding and deciding herein that the franchises, grants and rights of your petitioner and its predecessors in title were not assignable by said Act without the consent of the Village of Orrville and that the interpretation and construction put upon the Act of May 12, 1886, holding and deciding therein that said franchises, grants and rights of The Orrville Light, Heat and Power Company and the other predecessors in title of your petitioner, could not be assigned without the consent of the Village of Orrville, Ohio, are in conflict and contrary to the previous interpretation and construction of said Acts by said Supreme Court of the State of Ohio in the case of *The Hardin-Wyandot Lighting Company v. The Village of Upper Sandusky* (93 O. S. 428), as affirmed by the Supreme Court of the United States (251 U. S. 173).

That your petitioner, relying upon said former interpretation and construction of said Acts, did after the decision in the said *Hardin-Wyandot* case, on or about the 29th day of October, 1921, purchase the said electrical plant in the Village of Orrville, Ohio, and said franchises, grants and rights to distribute electricity therein. That said present interpretation of said Acts by the Supreme Court of the State of Ohio is in violation of and repugnant to the Constitution of the United States of America, and especially to Section 10 of Article I thereof, and Section 1 of the 14th Amendment thereof."

(3) The assignments of error which relate to the impairment of the franchise of February 1, 1892, by ordinance and resolution of June 18, 1923, are as follows:

"7. The Supreme Court of Ohio erred in holding that the franchise, grants and rights of your petitioner and its predecessors in title, acquired from the Village of Orrville, Ohio, under an ordinance passed by the Council of said Village on February 1, 1892, entitled 'An ordinance providing for electric lights, heat and motive power in the Village of Orrville, Ohio, Wayne County, Ohio' were revoked, annulled and cancelled by the ordinance and resolution of said Village of Orrville, Ohio, passed by the council thereof on the 18th day of June, 1923, contrary to and in violation of the provisions of Section 10, Article I of the Constitution of the United States, and of Section 1 of Article Fourteen of the amendments thereto."

"14. The Supreme Court of the State of Ohio erred in refusing to hold and decide that the ordinance and resolution of said Village of Orrville, passed by the Council thereof on the 18th day of June, 1923, impaired the obligations of the contract, namely, the franchises, grant and right to your petitioner and its predecessors in title acquired from the Village of Orrville, Ohio, under the ordinance passed by the Council of said Village on February 1, 1892, and was and is

in violation of and in conflict with Section 10 of Article I of the Constitution of the United States and of Section 1 of Article XIV of the Amendments thereto."

"15. That the Supreme Court of Ohio, in said final order and judgment adjudged and decided that said franchises, grants and rights to distribute electricity in said Village of Orrville, Ohio, as aforesaid, were revoked and annulled by said ordinance and resolution of said Village of Orrville, Ohio, under authority of a certain Act, passed by the General Assembly of the State of Ohio on the 12th day of May, 1886, entitled 'An Act to authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets, and other public places with electricity' (83 O. L. 143); and it was adjudged and decided by said Supreme Court by its final order and judgment herein that said ordinance and resolution of June 18, 1923, of the Village of Orrville, Ohio, was not in violation of, nor repugnant to the provisions of Section 10 of Article I of the Constitution of the United States of America, nor of Section 1 of the 14th Amendment thereof."

(R. 105, 108)

(See also Statement of Points, No. 5 i, n.)

(4) The assignments of error which relate to the impairment of the franchise of the Company whether obtained from the state or from the Village by the ordinance and resolution of June 18, 1923 are the 5th and 6th assignments of error (R. 105) and the 13th assignment of error (R. 108. See also Statement of Points, No. 5 b, h and m).

"5. The Supreme Court of the State of Ohio erred in holding that the franchises, grants and rights of your petitioner and predecessors in title to distribute electricity in said Village of Orrville, Ohio, were revoked, annulled and cancelled by the ordinance and

resolution of said Village of Orrville, passed by the Council thereof on the 18th day of June, 1923, under the authority of the provisions of said Act of April 21, 1896—contrary to and in violation of the United States Constitution and of Section 1 of Article XIV of the amendments thereto.”

“6. The Supreme Court of Ohio erred in holding that the franchise, grant and right of your petitioner acquired from the State of Ohio under said Act of the Legislature of said State passed January 26, 1887, above referred to, and the amendments thereto, was revoked, annulled and cancelled by the Act of the Legislature of said State passed on the 21st day of April 1896, and above referred to, and also in holding that said Act of April 21, 1896, conferred upon the Council of the Village of Orrville authority to cancel and annul said franchise, grant and right of your petitioner by the passage of the resolution and ordinance of June 18, 1923, all in violation of and in conflict with the inhibitions of Section 10 of Article I of the Constitution of the United States, and of Section 1 of Article 14 of the Amendments thereto.”

“13. The Supreme Court of the State of Ohio erred in refusing to hold and decide that the ordinance and resolution of said Village of Orrville passed by the Council thereof on the 18th day of June, 1923, impaired the obligations of the contract, namely, the franchises, grant and right of your petitioner acquired from the State of Ohio under Act of the Legislature of said State passed January 26, 1887, and was and is in violation of and in conflict with Section 10 of Article I of the Constitution of the United States and of Section 1 of Article XIV of the Amendments thereto.”

**BRIEF.**

The contract upon which the plaintiff in error relies in this case is based upon two separate and distinct grants: (1) the grant from the State of Ohio under the Act of January 26, 1887 (84 O. L. 7) to The Orrville Light, Heat and Power Company, in 1893, and (2) the franchise from the Village of Orrville passed February 1, 1892 to Gans and Wilson.

It is the claim of the plaintiff in error that under said contract it has a perpetual franchise to use the streets of the Village of Orrville for the distribution of electricity for light, heat and power purposes, and that the legislation passed by the Village of Orrville on June 18, 1923, and the Act of April 21, 1896, as construed and applied by the Supreme Court of Ohio, terminating and annulling the said rights, has the effect to impair the obligation of said contract contrary to the contract clause of the Constitution of the United States.

In presenting the questions of this case, we shall consider:

*FIRST. Was there a contract?*

*SECOND. If so, what obligation arose from it?*

*THIRD. Has that obligation been impaired by subsequent legislation?*

Of course, it is well settled that where a question is raised as to whether a state has violated the clause of the Federal Constitution, prohibiting the impairment of the obligation of contracts, this Court will determine for itself the existence, construction and validity of the alleged contract.

It is a general rule that the Federal Courts will fully acquiesce in the interpretation of state statutes and local matters and ordinances placed on them by state courts. There is, however, an exception to this rule, and that is

where a question is raised as to whether or not a state or local provision has impaired the obligation of a contract, and when such question is presented, the Federal Courts determine for themselves and by the exercise of their independent judgment the existence and extent of the contract and the effect of the challenged law or ordinance.

It therefore follows that under such circumstances this Court is not bound by any decision of the Supreme Court of the State upon questions of general jurisprudence, such as the law governing contracts between parties, and similar questions, but must construe for itself the contract and franchise here presented independently of any decision of the State Court. This rule is so well settled that we merely refer in passing to some of the many authorities applicable.

In *Jefferson Branch Bank vs. Skelly*, 1 Black. 436, 444 (1861), Mr. Justice Wayne, delivering the unanimous judgment of the Court said:

"It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court

should or could with fidelity to the Constitution of the United States follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a State, by its authority."

In *Douglas vs. Kentucky*, 168 U. S. 488, 502 (1897), Mr. Justice Harlan in his opinion quoted the above paragraph, and said:

"The doctrine that this court possessed paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases. *Ohio Life Ins. Co. v. Debolt*, 16 How. 416, 452; *Wright v. Nagle*, 101 U. S. 791, 794; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 697; *Vicksburg, Shreveport, etc. Railroad v. Dennis*, 116 U. S. 665, 667; *N. O. Waterworks Co. v. Louisiana Sugar Co.*, 125 U. S. 18, 36; *Bryan v. Board of Education*, 151 U. S. 639, 650; *Mobile & Ohio Railroad v. Tennessee*, 153 U. S. 486, 493; *Bacon v. Texas*, 163 U. S. 207, 219."

In *Detroit United Railway vs. Michigan*, 242 U. S., 238, at page 249, Mr. Justice Pitney said:

"But, notwithstanding what was there said, it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation

arose from it? and (3) Has that obligation been impaired by subsequent legislation? *Houston & Texas Central R. R. Co. v. Texas*, 177 U. S. 66, 77; *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 147; *Terre Haute Etc. R. R. Co. v. Indiana*, 194 U. S. 579, 589."

*Ohio Life Ins. Co. vs. Debolt*, 16 How. 416, 452;  
*Chicago vs. Robbins*, 67 U. S., 304;  
*Wright vs. Nagle*, 101 U. S., 791, 794;  
*Burgess vs. Seligman*, 107 U. S., 20, 33;  
*Myrick vs. Michigan C. R. Co.*, 107 U. S., 102;  
*Louisville Gas Co. vs. Citizens' Gas Co.*, 115 U. S., 683, 697;  
*Vicksburg, Shreveport, etc. R. R. vs. Dennis*, 116 U. S. 665, 667;  
*N. O. Water-works Co. vs. Louisiana Sugar Co.*, 125 U. S., 18, 36;  
*Pleasant Twp. vs. Ins. Co.*, 138 U. S., 67;  
*Bryan vs. Board of Education*, 151 U. S., 639, 650;  
*Mobile & Ohio R. R. vs. Tenn.*, 153 U. S., 486, 493;  
*Bacon vs. Texas*, 163 U. S., 207, 219;  
*McCullough vs. Virginia*, 172 U. S., 102, 109;  
*Walsh vs. Columbus, Hocking Valley & Athens R. R. Co.*, 176 U. S., 469;  
*Washburn & Moen Mfg. Co. vs. Reliance Ins. Co.*, 179 U. S., 1, 15;  
*Stearns vs. Minnesota*, 179 U. S., 223, 233;  
*Northern Pacific Ry. vs. Duluth*, 208 U. S., 583;  
*Grand Trunk West'n Ry. Co. vs. South Bend*, 227 U. S., 544, 557;  
*N. Y. Elec. Lines vs. Empire City Subway*, 235 U. S., 179;  
*Owensboro vs. Owensboro Water Works Co.*, 243 U. S., 166;  
*Mitchell vs. Dakota Central Telegraph Co.*, 246 U. S., 396.

## I. WAS THERE A CONTRACT?

The Supreme Court of Ohio held, that there was a contract between the Village of Orrville and the electric lighting company, but as the duration thereof was indeterminate, the municipal corporation could terminate the same and its obligations thereunder. The syllabus is as follows: (R. 200)

“Where the contract between a municipal corporation and an electric lighting company is silent as to the duration of the franchise such franchise is not perpetual, but the duration thereof is simply indefinite, existing only so long as the parties mutually agree thereto. A municipal corporation may therefore voluntarily terminate its obligation under the contract and wholly withdraw therefrom.”

In the opinion the Court says (R. 206):

“It is not of great moment to decide whether the respondent is correct in claiming that the ordinance of 1892 constituted a special franchise to use the streets of the village. In either case, whether the right in question was derived from the state or the village, it was not under the circumstances set forth in this record assignable. If it was a state right it could not at the time of the attempted assignment to Renneckar in 1907 be transferred without the consent of the state. If it was a special franchise from the village, it could not after 1896 be exercised by an assignee without the consent of the village.”

Both the Court of Appeals and the Supreme Court of Ohio refused to find as claimed by the Relator that (1) no franchise had been granted, or (2) that the franchise had been forfeited by abandonment and non-user. (R. 13, 14). The Court of Appeals said (R. 36, 37):

“Under the evidence in this case we do not find, as Relator asks us to find, that the Respondent did not acquire such rights as were granted by the Ordinance of 1892, nor do we find that such rights have

been forfeited by the conduct of Respondent and its predecessors in title."

The Supreme Court said, with respect to said judgment of the Court of Appeals (R. 203):

"Since the Court refused to give the judgment of ouster either upon the ground that no franchise had been given or upon the ground of abandonment and non-user, it is evident that the Court of Appeals must have found against the Relator upon these questions of fact. There is evidence in the record to sustain the conclusion of the Court of Appeals upon these questions, and we therefore shall not discuss them but shall pass directly to the main point of law involved in the case."

It is therefore conceded that the State Courts did find that some contract existed with respect to the right to use the streets of Orrville. But as we do not agree with the Supreme Court of Ohio as to what that contract was, nor as to the nature and extent of the obligations arising thereunder, we will set forth our contentions with respect thereto under this heading of the brief, although they might more properly be discussed under the second main heading. As the rights of the plaintiff in error to use the streets of the Village of Orrville are based both upon the grant from the State of Ohio to The Orrville Light, Heat and Power Company in 1893 and upon the franchise to Gans and Wilson in 1892, we will discuss our contentions relating thereto separately.

**(1) THE STATE FRANCHISE ACQUIRED BY THE ORRVILLE  
LIGHT, HEAT AND POWER COMPANY IN 1893.**

The Orrville Light, Heat and Power Company received directly from the State of Ohio under the Act of January 26, 1887, (84 O. L. 7) the right to use the streets of Orrville for the distribution of electricity for public and private use. The franchise so granted is silent as to its

duration, and as it contemplates the making of permanent improvements, which were constructed at a large expense and devoted to the public use, it is perpetual.

The statute granting the state franchise is Section 3454, Revised Statutes, now known as Section 9170, General Code. In order to make such grants effective, the State of Ohio also gave to such companies the right to appropriate any lands, held by any individual or corporation, (Sections 3456 to 3460 R. S., now 9172 to 9177 General Code) and including land " \* \* \* subject to the easement of a street, alley, public way or other public use within the limits of a city or village \* \* \*." (Sec. 3461, R. S., now 9178 Gen. Code.)

These sections were first construed by the Supreme Court of Ohio with respect to telephone franchises under Section 3471, Revised Statutes, and it was held that by virtue of said sections, such companies acquired directly from the state the right to construct their lines along the streets and public ways of municipal corporations, and that the provisions of Section 3461, R. S., authorizing the probate court to determine in what mode the line shall be so constructed, were not unconstitutional for the reason that power so exercised by the probate court is not the grant of a franchise right, but the judicial determination of the manner in which the said franchise shall be exercised in public highways. *Zanesville vs. Telegraph and Telephone*, 64 O. S. 67, (decided January 22, 1901). Speaking of said Section 3461, the court at page 80 says:

"This is practically a provision for an appropriation proceeding against the municipality, and it is the only proceeding of that nature that is necessary against the municipal body in order to enable the company to make the needed use of its streets. It will be noticed that it is not the right to use the streets that is made the subject of agreement between the company and municipal authorities or of determination by the court.

That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality. It is only the mode of such use that becomes the subject of agreement or judicial determination."

Again, at page 82 it is said:

"The statute contemplates that if the mode of using the public ways of cities and villages by telephone companies were left entirely to agreement between the Council and company, the franchise of the latter might be made unavailable by the refusal of the former to negotiate with the latter, or by bona fide disagreement of the parties,—a contingency not unlikely to occur; and hence the necessity that the provisions of Section 3461 now in question, by which jurisdiction is conferred on a competent court to determine the mode of such use by an order binding on both parties."

This whole question was most thoroughly considered by the Supreme Court. At first the court reached the exactly opposite conclusion in 63 O. S. 442, holding that the power conferred on the probate court by Section 3461 was legislative, and not judicial in character, and that therefore the section was unconstitutional. The decision in the 64 O. S. 67, however, was followed and approved in *Farmer vs. Telephone Co.*, 72 O. S. 526, and *Queen City Telephone Co. vs. Cincinnati*, 73 O. S. 64, with respect to telephone companies, and in *Hardin-Wyandot Lighting Company vs. Village of Upper Sandusky*, 93 O. S. 428, with respect to electric lighting companies under Section 3471-A, R. S. With respect to the foregoing cases, the court in *Hardin-Wyandot* case, at page 437, said:

"Section 9191 provides that the provisions of this chapter shall apply also to a company organized to construct a line or lines of telephone.

“In *City of Zanesville v. The Zanesville Telegraph & Telephone Co.*, 64 Ohio St., 67, it was said, at pages 80 and 81: ‘It will be noticed that it is not the right to use the streets that is made the subject of agreement between the company and the municipal authorities, or of determination by the court. That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality. It is only the mode of such use that becomes the subject of agreement or judicial determination.’

“In *Farmer et al. v. The Columbian County Telephone Co.*, 72 Ohio St., 526, it is held: ‘Telephone companies organized in this state obtain power to construct their lines along the streets and public ways of municipal corporations from the state by virtue of sections of the Revised Statutes, 3454 to 3471-8, inclusive, and not from the municipal authorities.’ And in *The Queen City Telephone Co. v. City of Cincinnati*, 73 Ohio St., 64, it is said, at page 81: ‘It is of course conceded as now well settled that the general power to occupy the streets of a municipality by a telephone company is derived from the state.’ ”

The agreement as to the mode of use of the streets of Orrville in the case at bar was made by said Gans and Wilson pursuant to said ordinance of February 1, 1892. The plant, including all poles, wires and appliances in the streets, was constructed in the year 1892 and put in service in that year. This completed plant, with all the street locations of wires and poles determined, was sold and assigned to the Orrville Light, Heat and Power Company upon its incorporation in the year 1893. As appears in the foregoing statement of facts, there was no disagreement between the Village and the Company with respect to the mode of the use of the streets, but the controversy which ensued grew out of the matter of the service furnished and the claim of the Village that the company had no franchise.

In 1916 the Supreme Court of Ohio in said *Hardin-Wyandot* case definitely held that the franchises of electric light and power companies were acquired in the same manner as those of magnetic telegraph companies and of telephone companies under the statutes referred to above. The first paragraph of the syllabus is as follows:

“The act of January 26, 1887 (84 O. L. 7) made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies, so far as practicable, and while said act remained in force the power of such companies to occupy the streets of a municipality was derived from the state.”

In the opinion the court, p. 436, said:

“The plaintiff in error rests its case here on the broad proposition that the right to distribute electricity over the streets of the village emanates from the state and not from the municipality. It is contended that the plaintiff in error and its predecessor were organized under the laws of Ohio, with all the powers and privileges granted to telegraph and telephone companies by Section 9170 *et seq.*, General Code, and that therefore no village ordinance was necessary to make its rights effective, except such as related to the mode of use.”

Again, at pages 438 and 439, it is said:

“It is contended by the plaintiff in error that Sections 9192 and 9193, General Code, confer upon electric light and power companies all of the powers conferred upon telegraph and telephone companies in the sections above referred to.

“In the consideration of this contention it is necessary to briefly review the history of legislation on the subject. The sections of the General Code above mentioned are included in Section 3454, *et seq.*, Revised Statutes. Those sections were in effect at the time the transactions involved in the cases above mentioned occurred, and were in effect long before the granting of the franchise described in the petition in this case.

"The first enactment touching the power of companies organized for the purpose of supplying electricity for lighting streets, etc., was passed May 12, 1886 (83 O. L. 143) and authorized such companies to construct lines for conducting electricity for power and light purposes through alleys, etc., 'with the consent of the municipal authorities of the city, village, or town, and under such reasonable regulations as they may prescribe.' Prior to 1886 there was no statute conferring power on the municipality to grant to an electric light company the right to erect poles. In the following year the Act of January 26, 1887 (84 O. L. 7), was passed as a supplementary section to Sections 3454 to 3471, being numbered Section 3471a. It provided that the provisions of the chapter (telegraphs and telephones), so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, squares and public places with electric light and power. This act did not repeal the act of May 12, 1886, *supra*, in express terms, but when the two acts are construed together it is clear that it was the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.' This was the state of the law at the time of the granting of the franchise (March 4, 1889) which is involved in this case. Therefore, under the holdings in the cases cited, the grantee company derived its general power to occupy the streets from the state."

On page 442 the court said:

"In this posture of the case, while in view of the statutory provisions which were in force at the inception of the enterprise the village would not be entitled to annul the company's rights, still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it can not now return and repossess it.

self of such rights as it abandoned without the consent of the village in accordance with existing law."

The existing law to which the court refers is the act of April 21, 1896 (92 O. L. 205), by which Section 3471-a was amended so as to require the consent of the municipality. The court found that the company had abandoned certain rights in the streets, which it received by virtue of the act of January 26, 1887, and that it could not in the year 1912, return and repossess itself of those rights without the consent of the village.

The *Hardin-Wyandot Lighting* case was affirmed by this Court on December 15, 1919, (251 U. S. 173). The judgment of the Supreme Court of Ohio was restricted and limited in its application to an injunction against the restoration of the street lighting system which had been abandoned by the company. The effect of the judgment was to require the Company to get the consent of the village as to the mode of use of the streets in case it desired to restore such street lighting system, but the judgment did not affect the right of the company to use the streets for the distribution of electricity for general lighting and power purposes. The Act of April 21, 1896, (92 O. L. 205) was sustained as an exercise of police power in leaving the control of the mode of use of the streets with the municipal authorities alone, instead of a divided control with the probate court as the law was originally enacted. As thus interpreted, said Act of 1896 did not impair the contract rights of the company. With respect to the applicable state law and the source of the franchise, this Court at page 175 said,

"\* \* \* that at the time the ordinance of 1889 was passed and accepted, the applicable state statute provided that the 'mode' of use of the streets 'shall be such as shall be agreed upon between the municipal authorities of the \* \* \* village and the company; and,

if they cannot agree,' 'the probate court of the county \* \* \* shall direct' what the mode of use shall be. Rev. Stats. (1880) §3471-a; 84 O. L. 7, and Rev. Stats. §3461."

In the case at bar, however, decided in the year 1925, a new and radically different interpretation is put upon said law by the Supreme Court of Ohio, both in respect to (a) the source of the franchise rights, and (b) the effect of the Act of April 21, 1896. The syllabus, which is deemed to be the law of the case, speaks of "the contract between a municipal corporation and an electric lighting company," (Record 200). In the opinion the court says, (Record 205):

"At that time the statute enacted in 83 Ohio Laws, 143, was in force. It had not been expressly repealed by the enactment of Revised Statutes 3471-a (Section 9192 General Code) and it may be questioned whether it was repealed by implication in that enactment, inasmuch as in that statute the laws as to telegraph companies were made to apply to companies furnishing electric light so far as the same may be applicable.

"This statute, 83 Ohio Laws, 143, authorized electric companies to construct lines for conducting electricity for power and lighting purposes through alleys, etc. 'with the consent of the municipal authorities of the city, village or town and under such reasonable regulations as they may prescribe.' "

The court then says that these sections were construed in the case of *Hardin-Wyandot Company vs. Village of Upper Sandusky*, 93 O. S. 428, and said with respect to that case:

"The syllabus did not state that the statute of 83 Ohio Laws 143, was repealed by implication and in the judgment of the writer of this opinion such was not the effect of the enactment of Section 9192 General Code with its proviso that the provisions of the chapter should apply to electric light and power companies so far as applicable.

"However that may be, the above sections did not confer upon the Orrville Light, Heat and Power Company any specially designated rights in the streets of the village of the City of Orrville. Those rights must have been conferred either in the charter of incorporation or in the ordinance of 1892.

"It is not of great moment to decide whether the respondent is correct in claiming that the ordinance of 1892 constituted a special franchise to use the streets of the village. In either case, whether the right in question was derived from the state or the village, it was not, under the circumstances set forth in this record, assignable."

Notwithstanding the foregoing statements, the court does not overrule, but seems to approve and follow the holding in the *Hardin-Wyandot Lighting Company* case that the franchise of said companies was acquired under the Act of January 26, 1887, (84 Ohio Laws 7, Section 3471-a Revised Statutes). It would seem inconceivable that in the case at bar the Supreme Court of Ohio was overruling the law as laid down in the *Hardin-Wyandot* case, yet the syllabus and the statements quoted from the opinion would indicate that the court held that the Act of May 12, 1886, (83 Ohio Laws 143) was in effect in the year 1893 as well as the Act of January 26, 1887, and that at that time municipalities were authorized to grant franchises to electric lighting companies.

In view of the confused state of the law, resulting from the decision in the case at bar, it is necessary that we should consider what, if any, franchise rights the plaintiff in error has acquired from the Village of Orrville, and particularly under the franchise granted to Gans and Wilson by the ordinance of February 1, 1892.

**(2) THE ORDINANCE OF FEBRUARY 1, 1892, GRANTS A GENERAL FRANCHISE TO DISTRIBUTE ELECTRICITY FOR LIGHT, HEAT AND POWER.**

The ordinance of February 1, 1892, expressly grants the right "to use the streets, lanes, alleys, and avenues of the Village" for general lighting and power purposes. (R. 21) Its title is "An Ordinance Providing for Electric Lights, *Heat*, and *Motive Power* in the Village of Orrville, Wayne County, Ohio." (R. 21)

Section 1 of the ordinance expressly provides for "the distribution of electricity for light, *heat* and *power*."

Section 8 clearly shows that the grant was for commercial as well as public lighting. Throughout the ordinance reference is made to *motive power* as well as to lights and *heat*, thus expressly carrying the right to furnish commercial lighting, heat and power. It is apparent that the municipality would not require either *motive power* or *heat* for lighting the streets. These were inserted for a purpose, and that purpose was to include the general use of electricity for commercial lighting and power.

Furthermore, the contract ordinances of 1902, (R. 181-183) 1906 (R. 184-186) and 1910 (R. 188-190) specifically require the Company to furnish light for full commercial lighting in the Village and fix the rate per kilowatt hour. The record discloses that in fact the Company did furnish electricity in addition to that required for street lighting for the purpose of supplying the inhabitants with light and *motive power*.

The Court of Appeals in the course of its opinion made a finding that the ordinance in question contained no express provision as to the right to use the streets for commercial and private lighting purposes, but that the parties construed said ordinance as granting such rights and that

a plant was constructed and used for both public and private lighting. (R. 30)

The Supreme Court in substantially the same language said with respect to said Ordinance of February 1, 1892, (R. 211, 212) :

"It also contained no express provision as to the right of the Company to furnish electricity for commercial and private lighting purposes through the Village streets. However, after the construction of the electric light plant electricity was actually furnished, not only for public but also for commercial and private lighting purposes."

We ask this Court to examine this ordinance independent of the construction put upon it by the State Courts, and determine whether or not our contentions herein are correct. It is our position that said ordinance primarily grants a franchise, and that in consideration of such grant, the Company agreed to furnish certain arc lamps for street lighting purposes.

An analysis of the ordinance shows clearly that the street lighting contract is a consideration for the grant of the franchise rights. Section 3 expressly recites that "In consideration of the privileges hereby granted" said Gans and Wilson shall furnish, etc. -In both Sections 5 and 8 the words "The privileges and franchise hereby granted" are used. It would therefore appear from an examination of the ordinance itself, that it clearly comprehends both public and commercial lighting, and we do not see how the contract could reasonably be viewed in any other light.

#### **The Grant of a Franchise is the Primary Purpose of said Ordinance.**

Of course, it is quite apparent on the face of the ordinance itself that its main and primary purpose is the grant of the franchise, and that the street lighting contract there-

in contained and collateral thereto is the obligation or burden which the Company undertakes in consideration of such grant.

The ordinance provides for two separate and distinct matters, one, a franchise grant, general in terms and unlimited as to time, and second, a street lighting contract for ten years' duration.

Upon this point we invite attention to the Act of May 12, 1886 (83 O. L. 143), which is as follows:

#### **An ACT**

To authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets, and other public places with electricity.

##### *Powers of electric light and power companies.*

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe. Provided, that all wires erected and operated under the provisions of this act shall be covered with a waterproof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires.

*Contracts with municipalities.*

SECTION 2. The municipal authorities of any city, village or town, in which any electric light company is organized, may contract with any such company for lighting the streets, alleys, lands, lanes, squares and public places in such city, village or town.

SECTION 3. This act shall take effect and be in force from and after its passage.

DANIEL J. RYAN,

*Speaker pro tem. of the  
House of Representatives.*

S. A. CONRAD,

*President pro tem. of the  
Senate.*

Passed May 13, 1886.

The Supreme Court says that in 1892, when this ordinance was passed, the statutes in force included said Act of May 12, 1886 (83 O. L. 143) (R. 204, 205). Section 1 authorizes electric companies to construct lines for conducting electricity for power and light purposes through the streets and public places of the municipalities by the erection of poles and wires with the consent of the municipal authorities. Section 2 authorizes municipal authorities to contract with any company for the lighting of the streets and public places.

On March 1, 1889, Section 2491 of the Revised Statutes, which formerly authorized the lighting of the streets with natural or artificial gas, was amended to include electric light, as follows: (86 O. L. 62, 63):

“Section 2491. A municipal corporation may contract with such company for supplying, with electric light, natural or artificial gas for the purpose of lighting the streets, squares and other public places and buildings in the corporation limits; but this section

shall be subject to the restrictions of the last clause of Section thirty-five hundred and fifty-one."

In *City of Wellston vs. Morgan*, 59 O. S. 147 (1898) it is said:

"1. Where a statute gives power to a municipal corporation to contract for the lighting of its streets and other public grounds for a period not exceeding ten years, the conclusive implication is that such corporation is forbidden to contract for a longer period. And where such corporation undertakes, by the passage of an ordinance, to contract with an electric light company for an exclusive privilege to such company for the use of the streets, etc. for ninety-nine years, at a given price per month, such ordinance is *ultra vires* and void, and the contractual stipulations contained therein are equally void, and neither party can enforce them."

At page 156, the Court said:

"But the council had power under Section 2491-1 Revised Statutes (Bates) to contract in a legal way for the lighting of its streets and other public grounds for a term not exceeding ten years \* \* \*."

In 1902 the legislature of Ohio enacted the Municipal Code and carried over into the same, Section 45 thereof, a provision restricting municipal contracts for public lighting to a period not exceeding ten years, by the following provision:

"\* \* \* the council of any city may authorize and the council of any village may make (subject to the provisions of Sections 2491 and 3551 of the Revised Statutes of Ohio) a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, \* \* \* or for the leasing of the electric light plant and equipment, \* \* \* for a period not exceeding ten years, \* \* \*."

96 O. L., pp. 38, 39, Sec. 45.

This law with slight modification, but not changed as respect to time limit aforesaid, is still in force as Section 3809 of the General Code of Ohio.

In view of the fact that by statute street lighting contracts, as distinguished from franchises to occupy the streets, were limited to ten years, the ordinances of 1902, 1907 and 1912 aforesaid were necessary. That this was their sole purpose is shown by a reference to these specific ordinances themselves. The title of the ordinance of 1902 (R. 181) is "Ordinance Providing for Lighting Streets and Alleys"; Section 1 thereof obligating the Village with respect to public lighting at a designated rate for a period of five years, while Section 4 calls for "full commercial lighting in said Village to the citizens thereof" at a price not to exceed a designated maximum.

The titles of the ordinances of 1907 (R. 184) and 1912 (R. 188) are as follows:

"An ordinance providing for lighting the streets and alleys of the Village of Orrville, Ohio, and fixing the rates for commercial lighting."

Attention of the Court is particularly called to the fact that in each of said ordinances of 1902, 1907 and 1912 there is a specific provision in Section 4 that the party submitting the proposition to the village

"\* \* \* shall furnish light for full commercial lighting in said village to the citizens thereof at a price not to exceed seven and one-half cents per kilowatt hour meter rate." (R. 183, 186, 189)

Under the statutes of Ohio then in effect, a contract fixing the maximum rate which an electric lighting company may charge, could not be entered into for a period exceeding ten years. Sections 2478 and 2479 Revised Statutes (Sections 3982 and 3983 General Code) authorizes the council of any

municipality to fix the price which the electric lighting company may charge for electricity for a period of years, not exceeding ten years, and if the company assents thereto, a binding contract will thereby be consummated. *State ex rel. vs. Gas Co.*, 37 O. S. 45; *Gas and Fuel Co. vs. Chillicothe*, 65 O. S. 186.

In the Act of 83 O. L. 143 there appears the distinction for which we contend. In the case of a contract for public lighting and the fixing of rates, we have noted the applicable statutory limitation of ten years. Whereas, in the case of the franchise rights authorized to be granted by Section 1 of the said law, no limitation is specified. Any confusion encountered is the result of failing to clearly bear in mind the two objects sought to be accomplished by this ordinance of February 1, 1892, the primary purpose of granting a franchise, without limitation, by Section 1, and the incidental purpose of providing, in consideration of the foregoing, a street lighting contract for ten years; and the two distinct sets of applicable state law. When these are carried in mind the intention of the parties becomes at once apparent.

That this was the real intention of the parties is shown in a number of places throughout the record.

As pointed out by Charles B. Gilbert, (R. 50) the matter of the perpetuity of the franchise was discussed in the Council and was never contradicted. Mr. George W. King understood that he was purchasing an interest in a company that had a perpetual franchise (R. 59). Mr. D. I. Rennekar was interested in the operation of the plant from 1907 until March 13, 1913, and stated that this ordinance of 1892 was considered as a franchise, (R. 61) and he explains the difference between the ordinance of 1892, granting the general franchise, and the other rate fixing

contracts as he understood them (R. 61) and he testified that he was operating under the general or franchise grant of 1892 (R. 65). There was no evidence whatever in the record that any one regarded this Section 1 of the ordinance of February 1, 1892, as anything other than a perpetual franchise.

Moreover, the Village of Orrville through its duly authorized officers upon many occasions acknowledged the franchise. In its answer filed in the case of *Dravo-Doyle Co. vs. Village of Orrville* (R. p. 161), the Village expressly admitted that on the

“21st day of July, 1913, The Massillon Electric and Gas Company did in fact own and was operating an electric light plant in said Village of Orrville under a franchise duly granted to it, and that such franchise had not then expired and that said The Massillon Electric and Gas Company was then supplying from said plant electricity to the Village of Orrville, and the inhabitants thereof for lighting and power purposes, both public and private.”

In the agreed statement of facts in said case (R. pp. 171-172) it was stipulated

“That on July 21, 1913, and prior thereto and at all times since said date The Massillon Electric and Gas Company, an Ohio corporation, owned an electric lighting plant in said Village of Orrville and was furnishing electricity to said Village and the inhabitants thereof for both public and private lighting *under a franchise granted by said Village in 1892*, and that said franchise has not yet expired.”

The Supreme Court of the State of Ohio, in passing upon the case of *Dravo-Doyle Co. vs. Village of Orrville*, 93 O. S., 236, found that:

“On July 21, 1913, and prior thereto, the Massillon Electric and Gas Company, an Ohio corporation,

owned an electric lighting plant in the Village and was furnishing electricity to said Village and the inhabitants thereof, for both public and private lighting, under a franchise granted by said Village in 1892, and that said franchise has not yet expired."

In another case, that of *The Massillon Electric and Gas Company vs. Village of Orrville* (R. pp. 162-165), the Court of Appeals of Wayne County, Ohio, found the following:

"The petition in case No. 638 contains the necessary averments, that the plaintiff is the owner of said electric light works in the Village of Orrville under a franchise granted by said Village. No defense is made that the franchise has terminated. But it is claimed that the provisions of Section 3990 above quoted, are in conflict with the provisions of the amended constitution relating to municipalities, and especially in conflict with Section 5, Article 18 of the Constitution as amended." (R. p. 164)

That suit had been started by The Massillon Electric and Gas Company, the immediate predecessor of the plaintiff in error, to enjoin the Village from constructing its municipal light plant, on authority of Section 3990 of the General Code of Ohio, which provided in part as follows:

"\* \* \* in villages where gas works or electrical works have already been erected by any person, company of persons, or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, the council shall, with the consent of the owner or owners, purchase such gas works or electric works already erected therein."

In sustaining the claim of the plaintiff it became necessary for the Court to find the existence of a franchise which had not yet expired.

With the record so complete on the practical construction which the parties themselves gave to this contract, it

would be difficult to justify the reading into this contract something entirely different from this clear intention.

We again respectfully refer the Court to the resolution of June 18, 1923, and the ordinance of the same date passed by the Village Council of Orrville (R. pp. 138, 139 and 140) for the sole and express purpose of terminating the franchise granted February 1, 1892, and the right of The Ohio Public Service Company in and to the same, and to notify the Company with respect thereto, which legislation on the part of the Village took place after the dismissal without prejudice by Joseph O. Fritz, Prosecuting Attorney, of a similar case brought against The Ohio Public Service Company on April 2, 1923, seeking an ouster. Knowing that the parties had so construed this ordinance of February 1, 1892, and realizing that the Court had found that there was such a franchise still in existence, the Relator in this case did not care to proceed without first dismissing his first proceeding and taking legislative cognizance of the ordinance of February 1, 1892, and expressly repealing it in so far as the Village was able so to do.

We believe that the contract on its face without reference to any ordinances or understandings or transactions on the part of the parties involved is so clear as not to necessitate a construction, but that if the Court feels that a construction is necessary the instrument itself on its face affords that construction for which we contend; and that it is the proper construction is further evidenced by these transactions and matters of record and estoppel *in pais*. In this connection we wish to point out that the absence of any reference to the franchise designated in Section 1 of the ordinance of February 1, 1892, in the subsequent ordinances of 1902, 1907 and 1912 conclusively establishes the perpetual character of the grant originally given. Had the parties thought that the original grant of the franchise was

for a period of ten years they would have carried into these new ordinances a grant similar to that contained in Section 1 of the ordinance of February 1, 1892. That they did not, shows very clearly the practical construction put upon that franchise by the parties, namely, that it had been settled by the ordinance of February 1, 1892, and that no further action thereafter was necessary as touching that matter, although, as we have pointed out, it was necessary that the contract for public lighting and the fixing of the rates for commercial lighting should be renewed within the ten-year period.

**(3) THE ACCEPTANCE BY THE COMPANY OF THE FRANCHISE GRANTS CONSTITUTES A CONTRACT.**

Upon the question of acceptance of the franchise grant, the Court of Appeals said (R. 30):

“While at this late day no written notice of acceptance as provided in ordinance, could be produced, the conduct of the parties establishes an acceptance which made the contract binding upon both parties.”

The Supreme Court in its statement of facts said (R. 202):

“At the trial below no question was made by the Village that the contract embodied in the ordinance had not been accepted.”

The conduct of the parties, and particularly Gans and Wilson and The Orrville Light, Heat and Power Company, showed beyond question that the franchises were accepted. The grantees made the necessary investment to build the plant and thereby committed themselves to the rendition of the public service involved. In 1892 the plant, including the poles, wires and other construction in the highways, was completed, and service was furnished to the Village and its inhabitants. (R. 41, 61, 62) Thereafter said service was continued to be furnished by the various predecessors

in title of the plaintiff in error and was being furnished by plaintiff in error itself in 1923, when the legislation revoking its rights was enacted by the Village of Orrville.

The rule is well settled in this Court that an acceptance of a grant may be made by conduct of the grantee in taking possession and occupying the streets for the purpose allowed. In *Russell vs. Sebastian*, 233 U. S. 195, the constitution of the state itself directly granted to any individual or company the privilege of using the public streets of any municipality for furnishing gas and water, and did not provide for any formal acceptance. This Court held that such a grant could be accepted by taking possession and occupying the streets. The State Courts held that such acceptance extended only to those streets actually occupied, but this Court held that as the offer included the whole municipality, the acceptance extended to all of the streets of the city, saying, at page 207:

“In view of the nature of the undertaking in contemplation, and of the terms of the offer, we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service. The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position beyond recall, we can not doubt that the offer was accepted.”

Such a grant from the state, or a similar grant from a municipality, which includes all of the streets within the municipal limits, if accepted by the grantee constitutes a contract protected by the Federal Constitution. In *Russell vs. Sebastian, supra*, at page 204, this Court said:

"When the voice of the State declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. Moreover, the provision plainly contemplated the establishment of a plant devoted to the described public service and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a property right protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 680, 681; *Walla Walla v. Walla Walla Co.*, 172 U. S. 1, 9; *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, 663, 664; *Grand Trunk Rwy. Co. v. South Bend*, 227 U. S. 544, 552; *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, 65; *Boise Water Co. v. Boise City*, 230 U. S. 84, 90, 91. *Dillon on Municipal Corporations*, 5th ed. §1242."

In support of this view we refer to those authorities hereinafter cited at some length under the discussion of the perpetual character of the grant given by said ordinance, but in particular do we wish to refer to the case of *Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky*, 93 O. S., 428, where the Supreme Court of the State of Ohio held:

"The act of January 26, 1887, made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies, so far as practicable, and while said act remained in force, the power of such companies to occupy the streets of a municipality was derived from the State."

We also wish to refer to the same case of *Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky*, 251

U. S., 173, where this Court held that a contract existed between the company and the state and that the state statutes in force at the time the grant became effective were such that the village could not annul such rights as the company had retained in the streets.

Therefore, under the interpretation placed upon a similar ordinance by the Supreme Court of the State of Ohio and as approved and found by this Court in the case above referred to, where the very law in question was passed upon, there can be no other conclusion but that the ordinance of February 1, 1892, created a contract.

This brings us to the next and what we believe to be the fundamental and principal question in this case, namely, as to whether or not a contract franchise silent as to time, granting to a public service company certain rights in and to the village streets, is one in perpetuity or a mere license and as such revocable at the will of the granting power. We believe that it is a right in perpetuity and not so revocable.

## II. WHAT RIGHTS AND OBLIGATIONS AROSE FROM THE CONTRACT?

### (1) THE FRANCHISE GRANTS TO THE PLAINTIFF IN ERROR BEING UNLIMITED IN DURATION, ARE PERPETUAL.

The passage by the Council of the Village of Orrville, Ohio, of the Ordinance of February 1, 1892, and the grant from the State of Ohio under the Act of January 6, 1887, being unlimited as to time, created and established irrevocable and perpetual franchise rights, there being at the inception of those rights no controlling provision in the Constitution of Ohio, or of its statutes, and no prior adjudications by its courts to the contrary effect.

There was not at that time, nor is there now, any provision in the Constitution of Ohio with reference to the granting of franchises by public authorities or with respect to the duration of such grants.

The Act of January 26, 1887 (84 O. L. 7) and the applicable statutes referred to therein, likewise contain no provision relating to the duration of grants thereunder. The controlling section of said statutes is Section 3454, Revised Statutes, (Now Section 9170 General Code), which is as follows:

"A magnetic telegraph company heretofore or hereafter created may construct telegraph lines from point to point along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but the same shall not incommod the public in the use of such road."

To the extent that the franchise of the plaintiff in error is acquired from the Village of Orrville, the act which authorizes the Village to make such a grant, namely, that of May 12, 1886 (83 O. L. 143), likewise does not contain any provision limiting the period of time for which such grant may be made. As already pointed out in this brief, the

ordinance of February 1, 1892, in section 1, expressly grants the right to use the streets of the village, and contains no provision limiting the term or duration of the grant.

It is true that said ordinance, in addition to authorizing the use of the streets for the distribution of electricity, required the grantees to enter into a 10 year contract to light the streets of the village by arc lamps. Ten years was the maximum period allowed by statute for such a contract. This contract involved something more than the mere distribution of electricity, as it required the company to install arc lamps and other special apparatus on or between the poles in the highways, and keep the same maintained and in service, so as to furnish "electric light." All other business of the company consisted merely in furnishing electricity and the customer used the same as he chose, to produce, either light, heat or power. The franchise, contained in Section 1 of said Ordinance of February 1, 1892, included only the distribution of "electricity" and was silent as to the period of its duration.

If what has heretofore been said does not show conclusively that said ordinance dealt with two separate and distinct matters, and that with respect to the grant of the franchise right in Section 1 the term of the same was unlimited, we would refer the Court to the Syllabus of the case at bar, which is, under the state rule in Ohio, the law of the case. The syllabus says:

"Where the contract between a municipal corporation and an electric lighting company *is silent as to the duration of the franchise*, such franchise is not perpetual. \* \* \* (R. 200. The italics are ours.)

Likewise, in the opinion, the Court said:

"The record shows that the ordinance of February 1, 1892, creating the franchise for the erection and

maintenance of electric wire mains and apparatus in the streets of the Village of Orrville, Ohio, contained no express provision as to the duration of the franchise." (R. 211. The italics are ours.)

Then follows a statement which is wholly inconsistent and irreconcilable with the syllabus and the foregoing holding, namely, "(1) That it was the intention of the parties that the franchise should terminate at the end of ten years." (R. 212.) The court then proceeds to make an erroneous statement as to said ordinance, to-wit:

"The right to do commercial lighting is nowhere expressly granted and arose as an incident to the right to do public lighting, as to which the village bound itself for ten years only to take and use the light provided by Gans and Wilson." (R. 212.)

The court further said:

"we think that the parties intended that at the expiration of the ten-year period the right to sell commercial lighting for private purposes should be subject to further contract and revocable at will. In this view of the case, the phrase 'to the associates and assigns of Gans and Wilson' in the ordinance of 1892, meant that Gans and Wilson could assign the contract within the ten-year period but not after that time.

This case upon the facts then does not run counter to the decision in the case of *The Northern Ohio Traction and Light Company v. State of Ohio, ex rel. Pontius*, 245 U. S. 574, for circumstances are presented herein showing an intention upon the part of the parties to give and receive a mere revocable right after the expiration of the 10-year period." (R. 213, 214.)

We submit that this argument of the Court contained in its opinion, was inserted for the purpose of bringing this case within the exception mentioned by this Court in the 245th U. S. 574, namely, where the circumstances surrounding the grant show an intention to give or accept a

mere revocable right, then a perpetual franchise would not arise.

We can not understand how the Court, in its opinion, can fairly and consistently reach the conclusion that the intent of the ordinance of 1892 was to create a franchise for a period of ten years, when that Court, in its syllabus, holds that said franchise is silent as to its duration. The syllabus is the law of the case, and is controlling. If Section 1 of said ordinance was silent as to the duration of the franchise, when that ordinance was enacted in 1892, it remained silent as to the duration of the same, as it was never amended or changed at any time.

In the Resolution of June 18, 1923, terminating and annulling said franchise, the Village made no such claim, as that resolution provides,

*“Whereas, said ordinance does not specify the length of duration of said franchise.”* (R. 24.)

We submit that the matter contained in the opinion was inserted solely for the purpose indicated and to make it appear that this case was not one which would fall within the general rule laid down by this Court with respect to indeterminate grants. We feel confident that this Court will find that the franchise grant and street lighting contract were considered by the parties in 1892 as wholly separate and distinct, and that with respect to the franchise there is no provision as to its duration, and that with respect to the street lighting contract the term was made ten years because the statutes of the state did not permit such a contract to be entered into for a longer period.

This very point was considered and decided by this Court in *Owensboro vs. Owensboro Water-Works Co.*, 243 U. S. 166, where the ordinance of September 10, 1878 granted to the company in its first section a franchise “for the duration of said company,” and in another section re-

quired the water company to lay and maintain water pipes with fire hydrants for and during the term of twenty-five years. On June 3, 1889, the franchise was confirmed to a successor of the company for and during the existence of such corporation. The city claimed that under said ordinance and the conduct of the parties, the franchise was limited to twenty-five years. This Court held that the franchise to use the streets and the hydrant contract were two separate and distinct matters, saying, at page 173:

"It and the plaintiff's franchise were not coterminous and should not be confused."

The village in enacting the ordinance of February 1, 1892, was acting in a two-fold capacity (a) as a governmental body in granting the use of the streets for distribution of electricity, and (b) as a proprietor in securing a contract for lighting its streets by electricity. The original contract for lighting the streets for a ten-year period was doubtless the consideration for the grant of the franchise, as recited in the ordinance itself, yet upon the expiration of the ten years, the Company could not lawfully be compelled to enter into another contract. However, the right to use the streets under Section 1 of said ordinance would still continue, as the grant contained therein was indeterminate, whether the Company entered into another street lighting contract or not. This distinction is well illustrated in *Kaukauna Electric Light Co. vs. City of Kaukauna*, 114 Wise. 327:

"Syllabus 1. Where a municipal ordinance grants to an electric light company a franchise to use the streets upon certain conditions and also contains a contract with the company for street lighting, breaches of the conditions which are germane only to the franchise—such as those which relate to the burying of wires or the painting of poles—constitute no defense to an action to enforce payment for lights furnished under the contract."

Quoting from the opinion of the court, page 333:

"The ordinance or contract serving as the basis of the rights of the respective parties in this case is one of a character now become very common in this state, where the city acts in a two-fold capacity. First, as a governmental body exercising delegated power of the state, it confers, and limits with conditions, the privilege or franchise to use the public streets, under authority of Sec. 1780b, Stats. 1898. \* \* \* In addition to this function as an agent of the state, however, the city in the same instrument or ordinance, exercises its function as a business corporation, with power to purchase, contract for, and pay for electric lights for public purposes, and to specify the conditions of such contracting,—a power arising under its own charter. In the argument in this case, as in the ordinance itself, these two functions are greatly confused, and it is not always easy to separate those provisions which pertain to the one portion or the other of the instrument. In the formulation of such a document, reciprocal duties are usually imposed both upon the grantee of the franchise and upon the city. Some of these duties or conditions clearly relate exclusively to the subject of the franchise. Others with equal clearness may apply only to the contractual and commercial duty of supplying lights to the city, to be paid for when so supplied. Other provisions, conditions, and covenants may be of a mixed character, possibly applicable to both phases, so that their disobedience would at once constitute a breach of the plaintiff's contractual duty, which forms the basis of the city's promise to pay, and also a breach of the conditions upon which it holds its franchise from the state to occupy the public streets."

Quoting from the opinion the court, page 345:

"I fully concur in the result reached in this case. It was not found necessary to determine whether the action taken by the city was effectual to constitute a rescission of its lighting contract. *It attempted not*

*only to rescind the contract for lighting, but also to put an end to its franchise to use the streets. As regards its attempt to oust the company of its franchise rights, granted to it by the city as the agent of the state, its action is held nugatory."*

We submit, therefore, that at the inception of the franchise rights to plaintiff in error the language of the applicable statute and said ordinance of February 1, 1892, contained no limitation or restriction with respect to the duration of the franchise, and that under the rule established by this Court, such rights are not revocable permits, but perpetual grants.

This Court has refused to accept the construction put upon indeterminate grants by the Supreme Court of Ohio in 1909, with respect to franchises acquired prior to said date. *With respect to such prior franchises it will apply its own rule that such grants are not revocable permits but perpetual rights.*

This Court, in the case of *The Northern Ohio Traction and Light Company et al., vs. Ohio, ex rel.*, 245 U. S. 574, reversing the Supreme Court of the State of Ohio in *State, ex rel. vs. The Northern Ohio Traction and Light Company*, 93 O. S. 466, announced the law as applied under the Federal Constitution to such cases, of which that at bar is one, as follows:

"Where there are no controlling provisions in state constitution or statutes and no prior adjudications by its Courts to the contrary, a franchise for an interurban electric railway, granted by the proper state authority without limit as to duration, and in the absence of circumstances showing an intention to give or accept a mere revocable right, is a contract not subject to annulment at the will of the granting authority.

"Under the constitution and statutes of Ohio in 1892, county commissioners had power to grant fran-

chises over public roads valid for twenty-five years, if not perpetually.

"A resolution of county commissioners purporting to revoke an electric railway franchise, and treated by the state court as having that effect, amounts to state action, and, the franchise not being so revocable, such resolution impairs its obligation and is void."

In this case, the county commissioners of Stark County, on February 22, 1892, granted to William A. Lynch the right to construct and operate an electric railroad on the state road between Canton and Massillon. There was no period of time specified in the resolution as to the duration of the grant. In 1913, the county commissioners undertook to terminate the grant on the ground that it was a revocable license. In this contention they were sustained by the Supreme Court of Ohio (93 O. S. 466) on the authority of *Gas Co. vs. City of Akron*, 81 O. S. 33. In holding that the grant was a franchise and not a revocable license, subject to annulment, this Court said:

"Beyond serious doubt, under constitution and statutes of Ohio in 1892 county commissioners had power to grant franchises over public roads valid for twenty-five years, if not perpetually. Nothing said by the state courts prior to *Gas Co. v. Akron* (1909) is cited which intimates that grants, without specified limit of time, were revocable at will. Evidently this was not the settled view in 1903 when the circuit court distinctly adjudged that accepted ordinances by a city between 1861 and 1873, authorizing construction and operation of street railways, silent as to time, created perpetual rights, subject however to revocation by the General Assembly. *State ex rel. v. Columbus Ry Co.* (1903) 1 Ohio Cir. Ct. R. (N. S.) 145. This judgment was affirmed in 1905, 73 Ohio St. 363, 78 N. E. 1139, 'on the sole ground that the defendant had present right to occupy the streets at the time of the commencement of this action' a result hardly intelligible upon the the-

ory that the grants were revocable at will. Apparently the doctrine announced in *Gas Co. v. Akron*, was not suggested in either court.

"The circumstances surrounding the grant in 1892 shows no intention either to give or accept a mere revocable right. It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution of county commissioners. *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 384, 22 Sup. Ct. 410, 46 L. Ed. 592.

"Where there are no controlling provisions in state Constitution or statutes and no prior adjudication by its courts to the contrary, we have distinctly held that franchises like the one under consideration are contracts not subject to annulment as here undertaken. *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, 664, 32 Sup. Ct. 572, 56 L. Ed. 934; *Grand Trunk Western Ry. v. South Bend*, 227 U. S. 544, 556, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405; *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, 73, 33 Sup. Ct. 988, 57 L. Ed. 1389; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 117, 33 Sup. Ct. 967, L. Ed. 1410."

The particular pronouncement by the State Supreme Court upon which its decision, thus reversed, was based is found in the case of *East Ohio Gas Co. vs. City of Akron*, 81 O. S. 33, in which it had been held that

"where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto."

After this Court in the case of *Northern Ohio Traction and Light Company et al. vs. Ohio ex rel.*, 245 U. S. 574, had thus repudiated this doctrine or rule of the State Su-

preme Court as pointed out above, the State Supreme Court still adhered to its earlier interpretation and construction of indeterminate franchises, notwithstanding the contrary view taken by the United States Supreme Court, and in the case of *The East Ohio Gas Company vs. Cleveland*, 106 O. S. 489, held:

“Whatever may have been the interpretation of courts in other jurisdictions of the duration of franchise-contracts silent as to the term of duration, and the authorities upon that subject are not in accord, it has been the settled law of Ohio, not only since the announcement in *East Ohio Gas Co. vs. City of Akron*, *supra*, but at least since the date of the franchise-contract there under consideration, to-wit, September 26, 1898, that a franchise-contract silent as to term of duration is terminable at the will of either party thereto; that the declaration by the Supreme Court of the United States in the case of *Northern Ohio Traction & Light Co. vs. State, ex rel., Pontius*, *supra*, was effective for the purpose of establishing the rights between the parties thereto, but not for the purpose of supplanting the interpretation of the laws of Ohio by this Court.”

In arriving at the foregoing conclusion, and for the purpose of not appearing to override the United States Supreme Court, the State Supreme Court in the case of *The East Ohio Gas Company vs. Cleveland*, (106 O. S., p. 489), which was decided December 29, 1922, stresses the dates of the franchise in question, in that particular case, 1902, and in the case of *East Ohio Gas Company vs. City of Akron*, (81 O. S. 33) September 26, 1898; both of which were subsequent to the decision in the case of *Wabash Railroad Co. vs. Defiance*, 52 O. S. 262, decided February 5, 1895, which date is specifically pointed out as the date of the first intimation of Ohio Courts on the subject, and the date of 1898 in the Court’s opinion in the Cleveland case is made determinative and is claimed to distinguish those

cases from the conclusion reached by the Supreme Court of the United States.

The franchise considered by the United States Supreme Court in the case of *The Northern Ohio Traction and Light Company vs. Ohio, ex rel.*, 245 U. S., and found to be perpetual, notwithstanding the contrary view taken thereof by the State Supreme Court, was granted in 1892; the franchise rights under consideration in the case at bar, in so far as emanating from the municipality were granted on February 1, 1892, and as coming from the State on January 3, 1893, the date of the organization of *The Orrville Light, Heat and Power Company* (R., pp. 136-138\*); so that the rule announced by the State Supreme Court in the case of *The East Ohio Gas Company vs. Cleveland*, (106 O. S., p. 489) in its effort to excuse its holding against the settled Federal rule, clearly leaves the franchise in the case at bar to be governed by the rule announced by the Supreme Court of the United States in *The Northern Ohio Traction and Light Company et al. vs. Ohio, ex rel.*, 245 U. S. 574, and therefore, perpetual.

In *Louisville vs. Cumberland Telephone Co.*, 224 U. S. 649, the court at pages 663 and 664 said:

"In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city and the utility and value of the entire plant be thereby de-

stroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

"This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happenning of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the city of Louisville. Such has been the uniform holding of courts construing similar grants to like corporations. *Milhau v. Sharp*, 27 N. Y. 611 (1863); *Hudson Telephone Co. v. Jersey City*, 49 N. J. L. 303; *Mobile v. L. & N. R. R.*, 84 Alabama, 122; *Seattle v. Columbia & P. S. R. R.*, 6 Washington, 379, 393; *People v. Deehan*, 153 N. Y. 528. The earlier cases are reviewed in *Detroit St. R. R. v. Detroit*, 64 Fed. Rep. 628, 634, which was cited with approval in *Detroit v. Detroit St. R. R.*, 184 U. S. 368, 395, this court there saying that 'Where the grant to a corporation of a franchise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee.' "

The foregoing authority would appear to be peculiarly applicable to the case at bar. The Orrville Light, Heat and Power Company was incorporated under a state law,

"for the purpose of Lighting the Village of Orrville in Wayne County, Ohio, by Electricity and to furnish heat and power for other manufacturing purposes." (R. 136)

The general state law then applicable bestowed upon electric lighting companies the right to erect their equipment upon public roads within the municipality, provided the same should not incommode the public in the use of the roads, subject to agreement with the municipal authorities as to the "mode of use" of the streets. (Sects. 3454, 3461, 3471a Revised Statutes,—Sects. 9170-9192 General Code—: 84 Ohio Laws, 7 R. 204, 205.)

This agreement was made by the Village Council in the ordinance of February 1, 1892, and in the language of Justice Lamar (224 U. S. 659),

"Those charter franchises had become fully operative when the city's consent was given, and \* \* \* such franchises \* \* \* could not \* \* \* be repealed \* \* \* by any ordinance \* \* \*."

But we need not argue by way of analogy, as this Court has placed its own construction on the very sections of the Ohio Law applicable to this case, where the identical rule for which we contend was recognized, although the decision there did not call for an application of the principle since the Company had forfeited its rights by abandonment. In the case of *Hardin-Wyandot Lighting Company vs. Village of Upper Sandusky*, 251 U. S. 173, referred to elsewhere in this brief, the Court on pages 175-177 says:

"That at the time the ordinance of 1889 was passed and accepted, the applicable state statute provided that the 'mode' to use the streets shall be such as shall be agreed upon between the municipal authorities of the village and the company, but if they cannot agree, the Probate Court of the County shall direct what the 'mode' of the use shall be.

"This amended law of 1896 is made the basis of the only contention in the case which is sufficiently substantial for special notice, viz., that by it the obligation was impaired of the contract which the company had with the *state* and *village*, arising from its acceptance

of the ordinance of 1889, and that it was thereby deprived of its property without due process of law.

“As we have seen when the ordinance of 1889 was passed, the statute then in force provided that the ‘mode’ in which the streets could be used for electric lighting and power appliances must be agreed upon between the village and the company, but that if they failed to agree, it must be determined by the Probate Court; and the amendment now claimed to be unconstitutional, consisted simply in giving to the municipality the exclusive control over the erection of any such appliances in the streets, instead of the prior qualified control. In this case the original ‘mode’ of use was determined by agreement without action of the Probate Court.

“There is nothing in the decree affecting the maintenance or renewal of such poles and wires as were in use for private lighting, when the case was commenced, and that this omission was of deliberate purpose appears from the fact that *both courts held that the state statutes in force at the time the grant became effective, and the form of the proceeding, were such that a decree annulling such rights as the Company had then retained in the streets could not properly be entered in the cause.*

“\* \* \* in view of the statutory provisions, which were in force at the inception of the enterprise the *village would not be entitled to annul the company's rights, \* \* \*.*”

Orrville ordinance should be construed as a perpetual grant in accord with foregoing and following authorities.

“An ordinance conferring a street franchise, passed by a municipality under legislative authority, creates a valid contract binding and enforceable according to its terms.”

“The contract clause prevents a State from impairing the obligation of a contract, whether it acts through the legislature or a municipality exercising delegated legislative power.”

“The ordinance of South Bend, Indiana, of 1868, permitting a railway company to lay a double track through one of its streets, and which had been availed of as to part of the distance, was a valid exercise of delegated legislative power, and no power to alter or repeal having been reserved, a subsequent ordinance repealing the franchise as to the double track was not a valid exercise of the police power to regulate the franchise, but an impairment of the contract and unconstitutional under the contract clause of the Constitution.”

*Grand Trunk West'n Ry. vs. South Bend*, 227 U. S. 544.

“Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside.”

*Grand Trunk West'n Ry. vs. South Bend*, *supra*, p. 557.

“Rights conferred by a municipal ordinance on a corporation qualified to conduct a public business come from the State through delegated power to the city.”

“A municipal ordinance granting to a corporation qualified to carry on a public business, such as a telephone system, the right to use the streets for that purpose, is more than a mere revocable license; it is the granting of a property right, assignable, taxable and alienable, an asset of value and a basis of credit.”

“Such a grant is one of property rights in perpetuity unless limited in duration by the grant itself or by a limitation imposed by the general law of the State or by the corporate powers of the municipality.”

*Owensboro vs. Cumberland Telephone Co.*, 230 U. S. 58.

“That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right,

has been too many times decided by this court to need more than a reference to some of the later cases: *Detroit v. Detroit Street Railway Co.*, 184 U. S., 368, 395; *City of Louisville v. Cumberland Telephone and Telegraph Co.*, 224 U. S. 649, 661; *Boise Water Co. v. Boise City*, \* \* \*. As a property right it was assignable, taxable and alienable. Generally it is an asset of great value to such utility companies and a principal basis for credit.

"The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a *grant of property right in perpetuity*, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant. *Detroit v. Detroit Street Railway*, *supra*; *Louisville v. Telephone Co.*, *supra*; *People v. O'Brien*, 111 N. Y. 1, 42; *Woodhaven Gas Light Co. v. Deehan*, 153 N. Y. 528; *Mobile v. L. & N. Railroad Co.*, 84 Alabama, 115; *Town of Arcata v. Arcata Railroad Co.*, 92 California, 639; *Hudson Tel. Co. vs. Jersey City*, 49 N. J. L. 303; *Dillon Mun. Corp.*, 5th ed., No. 1265; *Nebraska Telephone Co. v. Freemont*, 72 Nebraska, 25, 29; *Plattsmouth v. Nebraska Tel. Co.*, 80 Nebraska, 460, 466. If there be authority to make the grant and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from

a most weighty writer upon municipal corporations, in approving of the decision in *People v. O'Brien, supra*, a decision accepted and approved by the Court in *Detroit v. Detroit Street Railway, supra*—‘The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly, when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held under the legislation and facts that the right created by the grant of the franchise was perpetual, and not for a limited term only.’ *Dillon on Mun. Corp.*, 5th ed., No. 1265.”

*Owensboro vs. Cumberland Telephone Co., supra*, p. 66.

“Where there is no limitation in the general law of the State, nor in the charter of the city, as to duration of franchises for public utilities in the streets, the grant of an easement for that purpose, not specifying a period of duration, is in perpetuity.”

*Boise Water Co. vs. Boise City*, 230 U. S. 84.

“Under the laws of Nebraska, as construed by the highest courts of that State, municipalities had the power in 1884 of granting licenses to use the streets for public business; and, in the absence of a specific limitation of duration, such licenses were in perpetuity and conveyed rights of property within the protection of the contract clause of the Constitution of the United States.”

*Old Colony Trust Co. vs. Omaha*, 230 U. S., 101.

In *Russell vs. Sebastian*, 233 U. S. 195, the court at page 204 said:

"When the voice of the State declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. Moreover the provision plainly contemplated the establishment of a plant devoted to the described public service and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual, or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 680, 681; *Walla Walla v. Walla Walla Co.*, 172 U. S. 1, 9; *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, 663, 664; *Grand Trunk Rwy. Co. v. South Bend*, 227 U. S. 544, 552; *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, 65; *Boise Water Co. v. Boise City*, 230 U. S. 84, 90, 91. *Dillon on Municipal Corporations*, 5th ed., Sec. 1242."

"A grant of 'all the right and authority' that a city 'has the capacity to grant' to construct, hold and operate a street railroad on designated streets, without a hint of limitation as to time, is a grant in perpetuity if the city has authority to grant perpetually."

*Covington vs. South Covington St. Ry. Co.*, 246 U. S. 413.

"Under the contract clause of the Federal Constitution a state cannot substitute an indeterminate permit to supply a municipality with water for a clear contract between the municipality and the supply company, giving an exclusive right to furnish such supply for a definite term, with an obligation on the part of the municipality to purchase the supply system at the termination of such term, at a specified price."

*Superior Water, Light & Power Co. vs. Superior*, 263 U. S., 125.

"Considering the opinion of this Court, it seems clear enough that a valid contract resulted from the dealings between the City of Superior and plaintiff in error, whereby each became obligated to do certain specified things. \* \* \* The rights so acquired by plaintiff in error were property. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368, 384, 48 L. ed. 592, 606, 22 Sup. Ct. Rep. 410; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 536, 48 L. ed. 1102, 1108, 24 Sup. Ct. Rep. 756; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; *Louisville v. Cumberland Teleph. & Teleg. Co.*, 224 U. S. 649, 664, 56 L. ed. 934, 940, 32 Sup. Ct. Rep. 572; *Grand Trunk Western R. Co. v. South Bend*, 227 U. S. 544, 556, 57 L. ed. 633, 640, 44 L. R. A. (N. S.) 405, 33 Sup. Ct. Rep. 303; *Owensboro v. Cumberland Teleph. Co.*, 230 U. S. 58, 73, 57 L. ed. 1389, 1396, 33 Sup. Ct. Rep. 988; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 117, 57 L. ed. 1410, 1417, 33 Sup. Ct. Rep. 967; *Detroit United R. Co. v. Michigan*, 242 U. S. 238, 253, 61 L. ed. 268, 275, P. U. R. 1917B, 1010, 37 Sup. Ct. Rep. 87; *Northern Ohio Traction Light Co. v. Ohio*, 245 U. S. 574, 585, 62 L. ed. 481, 488, L. R. A. 1918E, 865, 38 Sup. Ct. Rep. 196; *Columbus R. & Power Company v. Columbus*, 249 U. S. 399, 407, 63 L. ed. 669, 675, 6 A. L. R. 1648, P. U. R. 1919D, 239, 39 Sup. Ct. Rep. 349."

*Superior Water, Light & Power Co. vs. Superior,*  
*supra*, pp. 134, 135.

We therefore submit that the grant from the state to The Orrville Light, Heat and Power Company, the associates of Gans and Wilson, and the ordinance of February 1, 1892, created and fixed certain vested rights and that the Village would have no power as a subsidiary of the State to destroy any grant or privileges thus acquired; and that the grant of said franchise rights, being silent as to duration, is perpetual and cannot be terminated at the will of the granting power.

**(2) THE FRANCHISE RIGHTS BEING PERPETUAL ARE ASSIGNABLE.**

As to the rights acquired under the ordinance of February 1, 1892, there can be no question that the same are assignable, as the ordinance in clear and express language makes the same assignable as follows: (R. 21)

“Sec. 1. That Aurel P. Gans and Mellville D. Wilson of Canal Dover, Ohio, their associates, successors and assigns, are hereby authorized and empowered to use the streets, etc.”

“Sec. 3. In consideration of the privileges hereby granted to said Gans and Wilson, their associates, successors and assigns, etc.”

Notwithstanding this particularly definite and clear intent on the part of the Village to make the franchise assignable, the Supreme Court of Ohio undertakes to qualify as follows: (R. 213)

“In this view of the case the phrase ‘to the associates and assigns of Gans and Wilson’ in the ordinance of 1892 meant that Gans and Wilson could assign the contract within the ten-year period and not after that time.”

Furthermore, the Supreme Court of Ohio with respect to both the state grant and the village franchise said: (R. 206)

“It is not of great moment to decide whether the respondent is correct in claiming that the ordinance of 1892 constituted a special franchise to use the streets of the village. In either case, whether the right in question was derived from the state or the village, it was not under the circumstances set forth in this record assignable. If it was a state right, it could not at the time of the attempted assignment to Renneckar in 1907 be transferred without the consent of the state. If it was a special franchise from the village, it could not after 1896 be exercised by an assignee without the consent of the village.”

Upon this question of assignability the Supreme Court of Ohio takes issue with the decision of this Court in *City of Louisville vs. Cumberland Telephone and Telegraph Co.*, 224 U. S. 649, on the ground that in the case at bar the Act of April 21, 1896 (92 O. L. 205) was a distinct limitation upon the right of the corporation to assign its franchise and property. (R. 209) Further elaborating its opinion the State Supreme Court said: (R. 209)

“\* \* \* furthermore, in the amendment of 1896 the Legislature expressly limited the right of assignment by providing that the streets of a village after that time could not be occupied by electric companies without the consent of the municipality. This amendment took effect prior to the attempted assignment to Renneckar in 1907, and hence Renneckar and his successors in operating the business were operating without the authority of the State of Ohio.

In other words, in the amendment of 1896 the state, so far from consenting to the assignment of the right to erect and maintain electric equipment in the streets of Orrville, limited the right of such assignment, because it conditioned such maintenance thereafter upon the consent of the municipality. Hence the assignment of 1907 was not effectual to transfer to Renneckar the right to operate in the village of Orrville. Moreover, since electric companies, after 1896, were prohibited by the state from operating in municipalities without their consent, after that date the assignee of the Orrville Light, Heat & Power Company, which operated without the consent of the village, was operating without the authority of the state of Ohio.

This holding is not in conflict with the decision in the case of *Hardin-Wyandot Lighting Co. v. Village of Upper Sandusky*, 93 Ohio. St., 428, 113 N. E., 402, affirmed in the Supreme Court of the United States, 251 U. S., 173, 40 S. Ct., 104, 64 L. Ed., 210, for the reason that the question of the assignability of the franchise was not raised in that case, and for the fur-

ther reason that in that case the village, not the state, was attacking the exercise of the franchise."

This interpretation of the Act of April 21, 1896 (92 O. L. 204), we insist, is in direct conflict with the interpretation placed upon said act by this Court, in 251 U. S. 173.

For convenience of reference, we insert herewith copy of the Act of April 21, 1896. (92 O. L. 204)

**AN ACT**

To amend section 3471a of the Revised Statutes of Ohio.

*Magnetic telegraph companies:*

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That section 3471a, as enacted January 26, 1887 (84 O. L., 7), be and the said section hereby is amended so as to read as follows:

*Laws applicable to electric light and power and automatic package carrier companies.*

*Municipal consent; penalty for violation; application of act, etc.*

SEC. 3471a. The provisions of this chapter, so far as the same may be applicable, except section three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lands, squares and public places with electric light and power, or automatic package carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for light-

ing, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court. Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunction or otherwise; and this act shall apply to actions and causes of action or proceeding named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal, in any circuit court of the state.

*Repeals, etc.*

SECTION 2. That said section 3471a shall be and the same hereby is repealed; and this act shall take effect and be in force from and after its passage.

DAVID L. SLEEPER,

*Speaker of the House of Representatives.*

ASAHEL W. JONES,

*President of the Senate.*

Passed April 21, 1896.

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This Court held in the *Hardin-Wyandot* case, that said Act of 1896 did not impair the obligation of the contract in that case, for the reason that it did not undertake to revoke the franchise of the Company or to modify or limit

the same except to restore to the municipality its police power with respect to control over the mode of use of its streets.

In the case at bar, however, the Supreme Court of Ohio has placed an entirely different construction upon said act, in that it now holds that the phrase "consent of such municipality" relates to the assignment or transfer of the property and franchise rights of the Company, and that no such transfer or assignment is valid unless the municipality assents thereto, that court says such consent is made a "distinct limitation," and a "condition" on the right of the company to sell and transfer its property and franchises.

In the *Hardin-Wyandot Lighting* case, the original ordinance of March 4, 1889 granted the franchise to The Citizens Electric Light and Power Company, "its associates, successors and assigns," and said ordinance was silent as to the period of duration of the franchise, there being no limitation as to the length of time it was to remain in force, nor any stipulation as to when it shall terminate. (93 O. S. 429). In 1912, the defendant in that case purchased the plant and the franchise of the original grantee. As no effect whatever was given by the State Courts to the repealing ordinance of 1915, the only legislation affecting the contract was said act of 1896, and as that act was interpreted and held as leaving the franchises intact, subject only to exercise of police power by the Village, the question of the duration of the franchise was not determined in that case. Likewise, the question of the assignability of the franchises was apparently conceded by the village and therefore was not made an issue in that case. Yet, it would seem that if it were the law of Ohio at that time that the property and franchises were not assignable, by the Citizens Electric Light and Power Company to The

Hardin-Wyandot Lighting Company, such an issue would have been made and insisted upon.

This Court held in *Louisville vs. Cumberland Telephone Co.*, 224 U. S. 649, that a legislative grant made to the telephone company was one in perpetuity, that it was assignable and could not be revoked by a subsequent ordinance of the City of Louisville as against the assignee of the original corporation, saying, at page 661:

“For, while franchises to be are not transferable without express authority, there are other franchises to have, to hold and to use, which are contractual and proprietary in their nature and which confer rights and privileges which can be sold wherever the company, as here, has power to dispose of its property.”

In the case of the *City of Owensboro vs. Cumberland Telephone and Telegraph Co.*, 230 U. S. 58, the original ordinance was passed December 4, 1889, and was made to The Cumberland Telephone Company, “its successors and assigns.” This Court held with respect to said ordinance:

“It vested a property right, capable of passing to an assignee, and did in fact, pass to the present consolidated company, whose life, by express action of its entire body of stockholders, is for two hundred years. That a corporation is capable of taking a grant of street rights of longer duration than its own corporate existence is the settled law of this court.” (p. 71)

On page 75, this Court says that:

“In June 1900, the Cumberland Telephone and Telegraph Company consolidated with The Ohio Valley Telephone Company” and that all of its property and franchises passed to the consolidated company, saying: “Being property, alienable and assignable, the street rights of the constituent companies passed to the consolidated company. The same question arose and was expressly decided in *Louisville vs. Cumberland Telephone and Telegraph Company, supra.*”

Upon the authority of these cases, the franchise of Gans and Wilson was not limited to the lives of these individuals but was assignable and particularly so as to the ordinance expressly reads in favor of them, their associates, successors and assigns, and likewise the franchise to The Orrville Light, Heat and Power Company was not limited to the corporate life of that company but constituted a property right, perpetual in duration, and therefore assignable and alienable, and an asset of value and a basis of credit.

The right which electric light companies and telephone companies receive from the State under Sections 3454 to 3471a, Revised Statutes, is a right-of-way or easement on the public highways. *Zanesville vs. Telegraph and Telephone Co.*, 64 O. S. 67; *Farmer vs. Columbiana Telephone Co.*, 72 O. S. 526. Although it may be said that the municipality holds the fee in the street, yet Section 3461, Revised Statutes, assumes that such interest of the municipality is merely that of an easement and that the Company in the event it cannot agree as to how the easement received by it from the State shall be enjoyed along with the public easement in question, permits the Company to apply to the probate court for the purpose of directing in what manner the two easements shall be enjoyed upon the highway.

This Court, in *Louisville vs. Cumberland Telephone Co.*, 224 U. S., 649, at page 661, said:

“Such a street franchise has been called by various names, incorporeal hereditament, an interest in land, an easement and right of way—but howsoever designated, it is property.”

And, being property, the Court held that it was immaterial whether the statute in question specifically authorized the sale and transfer of the “franchise.”

In *City of Owensboro vs. Cumberland Telephone Co.*, 230 U. S., 58, at page 65, it is said:

“That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company, is the granting of a property right, has been too many times decided by this court to need more than a reference to some of the later cases.”

In *Boise Water Co. vs. Boise City*, 230 U. S., 84, at page 90, it is said:

“The right which is acquired under an ordinance granting the right to a water company to lay and maintain its pipes in the streets is a substantial property right. It has all of the attributes of property. It is assignable and will pass under a mortgage sale of the property and franchises of the company which owned it.”

The foregoing case cites with approval the case of *Detroit Citizens Street Railway vs. City of Detroit*, 64 Fed., 628 (C. C. A. 6 October 2, 1894, Jackson, Lurton and Sage, J.J., Aff. 184 U. S. 368). The original franchise was granted to The Detroit City Railway in 1862, and in 1891 was transferred to the Detroit Street Railway Company, and later to the Detroit Citizens Street Railway Co. The corporate life of the original company was limited, and in view of that fact it was urged by the City that the grant of the franchise could not exceed in duration the corporate life of the company (page 633). At page 635, the Court held that the franchise was property, and assignable, and its duration did not depend upon the life of the original grantee, saying:

“The fact that it could not personally enjoy the interest thus granted after the expiration of its substantial and corporate franchises would not cut down the estate granted. Its power of alienation was unaffected, and its assignee, if otherwise endowed with

the franchises essential to the operation of street railways, might enjoy the rights and privileges derived by assignment."

In *Louisville Trust Co. vs. City of Cincinnati*, 76 Fed., 296, (C. C. A. 6 October 5, 1896. Taft, Lurton and Hammond, J.J.) it was held that the franchise of a street railroad is a property right which may be mortgaged and would pass to a purchaser at a sale under foreclosure, saying, at page 299:

"That these street easements originate in certain statutes of the State of Ohio and certain ordinances of the City of Cincinnati does not affect their character as contracts entitled to the protection afforded by the Constitution of the United States. The grant of a right to enter upon or occupy a public street with the necessary tracks, poles, wires and equipment of an electric street railway is a grant of a typical easement in property, and as such is a contract right capable, in absence of express restrictions of being sold, conveyed, assigned or mortgaged, and is, therefore, a right entitled to all the protection afforded other property or other contract rights \* \* \*. There is nothing in the law of Ohio which in any way contravenes the right of a railway company to mortgage its street easements, or which would prevent such easements from passing to a purchaser at foreclosure sale. It therefore follows that the complainant under the mortgage mentioned has acquired the substantial right in the street easements of the mortgagor company, and cannot be deprived of its security by a proceeding directly impeaching their validity and duration without being made a party thereto."

In *Knoxville vs. Africa*, 77 Fed., 501 (C. C. A. October 5, 1896), (Taft, Lurton and Hammond J.J.) it was held that a railway right-of-way in a public street, whether granted by legislature or city council, is an easement, and as such is a property right capable of assignment,

sale and mortgage, and entitled to all the Constitutional protection afforded other property rights and contracts.

It is our claim therefore, that (a) in Ohio the franchise of an electric lighting company is an easement, and as such is a property right capable of assignment and sale, (b) and in addition that corporations in Ohio are expressly authorized to sell all of their property; (c) furthermore, there are many acts of the legislature expressly authorizing the sale not only of property but of all the franchises of railroads and public utilities, and (d) that the decisions of the Supreme Court of Ohio long prior to the granting of the franchise in question interpreted the law of Ohio as authorizing the sale and assignment of the property of railroads or other public utilities, including the franchise or right to operate and maintain the same.

There are no special statutes in Ohio providing for the incorporation of electric light and power companies, and such companies have at all times been incorporated under the general law with respect to incorporated companies. Section 3239 Revised Statutes, which was in effect in 1893 at the time of the incorporation of The Orrville Light, Heat and Power Company, sets forth the general powers of corporations (now Section 8627 General Code) as follows:

“Sec. 3239. (Corporation thereby created, and its general powers.) Upon such filing of the articles of incorporation, the persons who subscribed the same, their associates, successors, and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession, and power to sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real or personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, the same to alter at pleasure, and to do

all needful acts to carry into effect the objects for which it was created. (50 v. 274, @ 3: S & C 273)"

Any corporation in Ohio may borrow money and secure the payment of the same by a mortgage of its real and personal property, or both. (Revised Statutes of 1880, Section 3256). On May 6, 1902, Section 3256 was supplemented by Section 3256a (95 O. L. 366), and provided for the recording with the county recorder of mortgages of electric light companies as follows:

"Such mortgage of real and personal property when heretofore or hereafter made by a company organized to operate a line or lines of telegraph, telephone, district telegraph messenger service, or for the purpose of supplying gas or electricity (or hot water) for lighting, fuel or other purposes \* \* \*."

By judicial interpretation many years prior to the enactment of the above statute, the Supreme Court held that a corporation organized for the purpose of manufacturing and supplying gas to the inhabitants of a village may borrow money and secure the payment of the same by note and a mortgage or pledge of its corporate property. *Hays vs. Galion Gas, Light and Coal Co.*, 29 O. S. 330, 337, 339. (1876).

Section 3256b Revised Statutes (now Section 8710 General Code) authorizes a corporation to sell " \* \* \* its entire property and assets to any person or association or to another corporation \* \* \*." Section 5674 Revised Statutes (now Section 8738 *et seq.* General Code) authorizes a corporation to abandon its corporate existence and to dispose of its property and assets.

On April 16, 1900, (94 O. L. 315) Section 2485a, Revised Statutes, was enacted, authorizing any two or more companies mentioned in Section 2478, Revised Statutes, to consolidate into a single corporation, in the same manner

and with the same effect as provided for the consolidation of railroad companies. Section 2478, included among other companies electric lighting companies (Act of March 1, 1889, 86 O. L. 62), which section was again amended on April 18, 1904 (97 O. L. 114), and as amended, included electric lighting companies.

On April 15, 1904, (94 O. L. 281) Section 2485a, Revised Statutes, was amended to include specifically "any electric light and power company." (Now Section 10,212 General Code). Sections 3470 and 3471a, Revised Statutes, also confer the power of consolidation upon electric lighting companies. (Now Sections 9190 and 9192 General Code).

The statutes relating to the consolidation of railroads were Sections 3379 to 3392, Revised Statutes, (now Sections 9025 to 9053, General Code). Section 9038 General Code provides that upon such consolidation " \* \* \* all the rights, privileges and franchises of each company to the agreement, and all property \* \* \* are to be deemed transferred to and vested in such new company without further act or deed."

On September 25, 1912, the joint application of The Orrville Light, Heat and Power Company to sell and The Massillon Electric and Gas Company to purchase, was filed with the Public Utilities Commission of Ohio, and on October 23, 1912, said Commission granted the authority requested and authorized the conveyance of all of the plant and property, together with all rights, privileges and franchises. (R. 128, 129).

At the time of filing said application, Section 614-60 General Code provided as follows:

"Sec. 614-60. With the consent and approval of the Commission, but not otherwise \* \* \*.

“b. Any public utility may purchase or lease the property, plant or business of any other such public utility.

“c. Any such public utility may sell or lease its property or business to any other such public utility. (102 O. L. 549, Section 63, Act of May 31, 1911).”

The power which an electric light company had under the foregoing statutes to mortgage and pledge its property and franchises, impliedly authorized such a company to alienate, sell and assign the same. The mortgage security would be of no value unless it carried with it the right of sale. Upon this question, in the case of *Coe vs. Railroad*, 10 O. S. 372 (1859) it was held that a railroad company could mortgage its property and its franchises, and such property and franchise would pass to the purchaser at the foreclosure sale. The Court was at great pains to state that such franchise did not mean the franchise of being a corporation, and that, of course, such a franchise would not pass upon foreclosure. At page 390, the court said:

“The corporation is authorized to pledge, not only its property—described in the special act as its ‘entire road, fixtures, and equipments, with all appurtenances’—but also the ‘income and resources thereof.’ To make this pledge an effectual and substantial security, such as was evidently contemplated and understood by those to whom it was offered, the right to use the property in the only mode by which it could produce an income, is absolutely essential. Any other construction of the power would be manifestly unjust.”

At page 407, the court said:

“With the real estate, and connected therewith, the franchise of the corporation to maintain the railroad, and demand compensation for the transportation of passengers and property, must be sold. This

franchise will be taken by a purchaser, with the rights and subject to the restrictions prescribed by law."

In *State vs. Sherman*, 22 O. S. 411, (1872), John Sherman and certain other persons purchased at judicial sale all of the property and franchises of certain Ohio railroads, whose property was being foreclosed, and organized what was known as the Fort Wayne Railway Company, under the laws of Pennsylvania, Indiana and Illinois. Thereupon John Sherman and others conveyed to the Fort Wayne Railway all of the property and franchises purchased at the judicial sale. (page 417). Thereupon one of the old railroads undertook to convey to the Fort Wayne Railway its franchise to be a corporation, in conformity with the provisions of the Act of April 4, 1863. Proceedings in quo warranto were brought by the Attorney General to (a) oust the Fort Wayne Railroad from its claimed franchise or charter to be an Ohio corporation, and (b) to challenge the conveyance of the property and franchises made by Sherman and others to the Fort Wayne Railway. The Court held that the Act of April 4, 1863, in so far as said Act may assume to make said railroad an Ohio corporation, was unconstitutional, but that the Fort Wayne Railroad had the right by the laws of Ohio to enjoy, exercise and use the franchises and privileges specified in the petition, other than that of being an Ohio corporation. The judgment, at page 434 is as follows:

"It follows that a judgment of ouster will be entered against the defendants as to the franchise of being a corporation of Ohio, and a judgment in their favor as to the other franchises and privileges which they are so charged with usurping."

In *Campbell vs. Marietta and Cincinnati Railroad*, 23 O. S. 168, (1872) part of the Scioto and Hocking Valley Railroad, with its equipment, personal property, together

with all of its franchises, rights and privileges, except the franchise to be a corporation, was sold by a receiver to The Marietta and Cincinnati Railroad. The charter of The Scioto and Hocking Valley Railroad was passed February 20, 1849, and authorized the charging of certain rates, and the question was whether the purchaser was subject to the limitations and restrictions contained in said charter. (pages 186, 187). The Court said at page 188, with reference to the Act authorizing a railroad to purchase a part of another railroad:

*“This act is entirely silent as to the terms upon which the purchased road may be maintained and operated by the purchasing company. Indeed, it does not in terms authorize the purchasing company to maintain and operate the purchased road at all, but such authority must be implied from the grant of power to purchase, for the reason that the legislature certainly did not intend that the purchased road should cease to be operated as a public highway. And inasmuch as no new mode of use or power of control was expressly provided, and as the power of the purchasing company to demand and receive tolls, as conferred by its own charter, is limited to roads constructed under the charter, it must be inferred that the legislature intended the purchasing company to succeed to the powers and privileges of the conveying company and to none others.”* (Italics are ours).

In *Stewart vs. Railway Company*, 53 O. S. 151, (1895) it was held that a judgment creditor of a railroad could by proceedings in equity enforce his lien by subjecting the whole property of the railroad to a sale. It was contended that the railroad being a public agency whose property was essential for the discharge of its duty, could not be sold on execution without specific statutory authority. The Court held that both the property and the franchise to maintain and operate the railroad could be sold, citing *Coe*

*vs. Railroad*, 10 O. S. 372, where such a sale was made upon foreclosure, saying as to that case, on page 169:

“The Court in that case distinguishes between the franchise of being a corporation, which, it is said, properly speaking, is a franchise of the incorporators, and the franchise to operate the road and make profits therefrom; and holds that the former can not be conveyed, or sold, while the latter may be.”

In the case of *Billings vs. Railway Company*, 92 O. S. 478, the distinction between a franchise to be a corporation and the grant of the right to occupy the public streets was commented upon as follows, at page 490:

“As to the contention of the plaintiffs that the city could not be vested with the power to grant franchises, which it is insisted resides exclusively in the state, it must be noted that the scope and meaning of the term franchises must be determined by its application. It is manifest that it has a dual meaning. There is wide difference between a franchise which is incident to and inheres in the right of the corporation to exist as a corporation and the grant of a right to occupy a public street and to construct therein a public utility. The creation of the former, the artificial person, must be done by the state itself. But this is not true of the latter.”

For many years prior to the decision of this Court in *Louisville vs. Cumberland Telephone and Telegraph Company*, 224 U. S. 649, this Court has held that the franchise of a railroad or other public utility was a property asset of the corporation and subject to sale or transfer, either voluntarily or on foreclosure proceedings. Likewise, the distinction between the franchise to be a corporation and the franchise as a corporation to maintain and operate its property was the law of this Court long before the controversy in the case at bar arose.

In *Memphis Railroad vs. Commissioners*, 112 U. S. 609 (1884) this Court held that:

“A franchise to be a corporation is distinct from a franchise, as a corporation, to maintain and operate a railway; the latter may be mortgaged, without the former, and may pass to a purchaser at a foreclosure sale.”

The opinion in this case was written by Mr. Justice Mathews, an Ohio lawyer from Cincinnati. At page 619 he says:

“The franchise of being a corporation need not be implied as necessary to secure to the mortgage bond-holders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation.”

Being familiar with the law of Ohio, in the course of his opinion, he refers to *Coe vs. Railroad*, 10 O. S. 372, and *State vs. Scioto and Hocking Valley Railroad*, 22 O. S. 411.

The rule announced in *Memphis vs. Commissioners*, *supra*, was followed in *New Orleans Railroad vs. Delamore*, 114 U. S. 501, (1885), where it was held that a grant by a municipal corporation to a railway company to construct its railroad through certain streets of the city, is a

franchise which may be mortgaged and pass to the purchaser at a sale under foreclosure.

In *Julian vs. Central Trust Company*, 193 U. S. 93, it is said, at page 106:

“It is true the right to be a corporation is not sold. By the statute the corporation is declared to be dissolved by the sale, and under other sections of the North Carolina code its affairs are to be wound up. But the franchise to operate and use the property has passed at the sale, and must have done so to make the purchase of any value. This principle, recognizing the distinction between the mere right or franchise to be a corporation and the franchise of maintaining and operating the railroad, was distinctly pointed out by Mr. Justice Matthews in *Memphis R. R. Co. v. Commissioners*, 112 U. S. 609.”

In *Vicksburg vs. Waterworks Co.*, 202 U. S., 453, the Court said, at page 464:

“Where a company is authorized to mortgage its franchises and rights, these may be sold and the purchaser acquire title thereto at foreclosure sale, although the corporate right to exist may not be sold. *Memphis R. R. Co. v. Commissioners*, 112 U. S. 609. The power to mortgage the privileges and rights of the corporation must necessarily include the power to bring them to sale to make the mortgage effectual. *New Orleans, etc. R. R. Co. v. Delamore*, 114 U. S. 501, cited and followed in *Julian v. Cent. Trust Co.*, 193 U. S. 93, 106. We think the mortgage in this case covered and the decree passed the contract rights given originally to the Vicksburg Water Supply Company by the ordinance of November 18, 1886.”

The right of two corporations to combine their stock or to consolidate, includes the right of one railroad to sell a part of its tracks, together with the franchise to operate the same, to the other railroad. *Branch vs. Jesup*, 106 U. S. 468 (1882). In this case, the charter of the South

Georgia and Florida Railroad Company authorized it at any time to incorporate its stock with the stock of any other company. In October, 1890, The South Georgia and Florida Railroad sold to The Atlantic and Gulf Railroad so much of its railroad as lies between Thomasville and Albany, together with the right to use and operate the same. The question was whether such sale was void as against public policy, and *ultra vires*. The Court held that the sale was valid. There was no specific statute authorizing the sale, nor any charter provision, except the right to incorporate their stock with the stock of another company. At page 478, the Court said:

"It seems to us clear that these powers were sufficient to enable the company to sell its road and franchises to any company competent to purchase them.

To summarize the statutory authority on railroads and public utilities in Ohio to sell their property, including the franchise to maintain and use the same, it appears that all such corporations have the general powers of contracting and to acquire, hold and sell real and personal property (Section 8627 General Code), to sell the entire property and assets (Section 8710 General Code), and to mortgage all of the property and assets of the corporation (Section 8705 General Code). In addition, electric lighting companies may sell all of their property and may consolidate with another electric lighting company (Section 10,212 General Code and Sections 9190, 9192 General Code) which latter sections specifically provide that upon such consolidation all of the rights, privileges and franchises of the parties to the agreement are to be deemed transferred to the new company. (Section 9038 General Code.)

In view of all this legislation, how can it be claimed that the transfer and sales made in the case were without legislative authority? The provision contained in the Act

of 1896 amending section 3471a, Revised Statutes, had never been held by the Supreme Court of Ohio as having anything to do with the transfer and sale of the property and franchises of an electric lighting company until the decision in the case at bar in the year 1925.

In 1919, this Court held that said provision related only to the exercise of the police power over the location of the physical property of the company in the streets. No suggestion was made by this Court that such provisions constituted a condition or limitation upon the transfer of the property of the Company or its franchises. It had to do with physical matters, such as poles and wires in the streets, and had nothing whatsoever to do with the corporate relations of the owners of the property or the transfer of the title to the same. Furthermore, the Record is perfectly clear that the Village of Orrville acquiesced in the transfer of property and franchises of The Orrville Light, Heat and Power Company to Renneckar in the year 1907. The Village thereafter made a contract with Renneckar to light the streets of the Village for a period of five years from and after July 15, 1912 (R. 188, 190), which contract was an extension of the contract made by The Orrville Light, Heat and Power Company which commenced on July 15, 1907 (R. 184, 186); in fact, the making of this latter contract was almost coincident with the taking over of the plant by Renneckar, as the ordinance of the Village was passed on November 19, 1906 (R. 186) and the plant was taken over by Renneckar on July 1, 1907 (R. 41, 133).

There are further matters in the Record which clearly show that the Village of Orrville consented and agreed to the transfer of the plant and franchises to Renneckar, and even if the Court were to urge that the consent of such village must be obtained under said Act of 1896, it was, in

fact, obtained, and the Village should be estopped from raising the question now after a period of over eighteen years. Nor is it of any importance that the question of assignability is now being raised by the State of Ohio and not by the Village of Orrville, (R. 210) for the reason that the construction put upon said Act of 1896 by the Court itself is that the consent should be obtained from the Village. The language of the Act being: "the consent of the municipality." Therefore, the State, through its legislature, having designated the municipality as the public body to give the consent, and that consent having been given, the rights of the State in these proceedings in quo warranto are no different than if asserted by the Village itself.

We therefore submit that the franchises involved in this case being perpetual, are necessarily assignable, and furthermore, that the Statutes of Ohio and the decisions of its Supreme Court interpreting the same, grant full legislative authority for the making of a sale and transfer of the same by one owner to another, and especially where the grantee of the property and of the franchise continued the operation of the same so that there was no interruption of service and no harm to the public.

### III. HAS THE OBLIGATION OF THE CONTRACT OF PLAINTIFF IN ERROR BEEN IMPAIRED BY SUBSEQUENT LEGISLATION?

The subsequent legislation upon which we rely as impairing the contract of plaintiff in error is:

(a) The ordinance and resolution of June 18, 1923, which specifically repeals the ordinance of February 1, 1892, and annuls and terminates all rights, franchises and privileges of the plaintiff in error in the streets of the Village of Orrville, Ohio, and orders and demands removal therefrom of all poles, wires and other electrical equipment; (R. 23, 24, 25) and

(b) The Act of April 21, 1896, 92 O. L. 204, as construed by the Supreme Court in the case at bar, making the state grant acquired by The Orrville Light, Heat and Power Company in the year 1893 non-assignable and non-transferable without the consent of the Village of Orrville.

#### (a) THE ORDINANCE AND RESOLUTION OF JUNE 18, 1923, IMPAIRS THE OBLIGATION OF THE CONTRACT WITH THE VILLAGE.

Said ordinance and resolution closely follow the language of the resolution adopted by the Board of Commissioners of Stark County, Ohio, as set forth in *Northern Ohio Traction Co. vs. Ohio*, 245 U. S. 574, 579, 580, 581. This Court held in said case that said resolution purporting to revoke the franchise and ordering the Company to vacate the streets, amounts to state action, and such resolution impairs the obligation of the contract and is void, saying, page 583:

“The Supreme Court determined, in effect, that a valid franchise to construct and maintain the railroad granted to Lynch and his successors in 1892 was terminated by the resolution of 1913. Accepting this ruling, is the latter resolution inoperative and void because in conflict with Art. I, Sec. 10 of the Federal Constitution? Manifestly it amounted to action by

the state. *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 148; *Ross v. Oregon*, 227 U. S. 150, 163."

In the case at bar, the Supreme Court of Ohio held that the Village of Orrville could terminate its obligation under the contract in question, and that it had done so by the enactment of said resolution and ordinance of June 18, 1923, saying, (R. 212):

"In 1923 the council of the village of Orrville repealed the ordinance of 1892, ordered the respondent to remove its equipment from the streets of the village within 30 days, and notified the respondent that 'all rights and privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including the said Ohio Public Service Company, be and the same are hereby terminated and ended.'

It is therefore evident that, in so far as it was within the power of the village so to do, it terminated and revoked the franchise of 1892."

We submit, therefore, that if a contract arose in 1892 between the Village of Orrville and the predecessors of plaintiff in error which constituted a property right in the nature of a perpetual and assignable easement, the resolution and ordinance adopted by the Village in the year 1923 was subsequent legislation and had the effect to annul and destroy such contract rights.

(b) **THE ACT OF APRIL 21, 1896 (92 O. L. 204) AS CONSTRUED BY THE SUPREME COURT OF OHIO, MAKING THE FRANCHISES OF THE PLAINTIFF IN ERROR NON-ASSIGNABLE AND NON-TRANSFERABLE WITHOUT THE CONSENT OF THE VILLAGE OF ORRVILLE, IS SUBSEQUENT LEGISLATION AND IMPAIRS THE OBLIGATION OF THE CONTRACT.**

Said Act, as we have heretofore pointed out, is now construed by the Supreme Court of Ohio as expressly limiting the right of assignment and making a continuance of the franchise rights conditioned upon the consent of the

municipality. (R. 209). The Court conceded that a consent was given to Gans and Wilson in 1892 and that the Village consented to the acquirement of the original plant by The Orrville Light, Heat and Power Company, but that after the passage of said Act of 1896 it was necessary for the subsequent assignees of the franchise, namely, Renneckar, The Massillon Electric and Gas Company and the plaintiff in error to again make application to the Council of the Village of Orrville and obtain its "consent" to the transfer of the franchise. The Court construes the word "consent" to mean a legislative grant or permission similar in character to that required when the rights were originally bestowed. Inasmuch as such "consent" had not been obtained to the assignments in question, they were held to be null and void. This construction of the Act of 1896 in the case at bar, we insist, constitutes an impairment of the rights received from the State of Ohio under the Act of January 26, 1887. It is true, that this Court in 251 U. S. 173 (1919) has construed this same law as not impairing the obligation of the contract in that case. Following as it did the construction put upon that Act at that time by the Supreme Court of Ohio, that construction, as we have heretofore said, gave to the Act of 1896 a wholly different meaning from the construction now placed upon the same. At that time, neither the Supreme Court of Ohio nor this Court intimated that said Act had the effect to revoke the rights theretofore given, nor to make the same non-transferable or non-assignable. The only effect said Act was held to have was to restore to the municipality its police power with respect to the control of the "mode" of use of the streets. For the convenience of the Court, the principal parts of the opinion of Mr. Justice Clarke (pages 176 to 179) are as follows:

"This amended law of 1896 is made the basis of the only contention in the case which is sufficiently sub-

stantial for special notice, viz., that by it the obligation was impaired of the contract which the Company had with the State and village, arising from its acceptance of the ordinance of 1889, and that it was thereby deprived of its property without due process of law.

"As we have seen, when the ordinance of 1889 was passed the statute then in force provided that the 'mode' in which the streets could be used for electric lighting and power appliances must be agreed upon between the village and the company, but that if they failed to agree it must be determined by the Probate Court, and the amendment, now claimed to be unconstitutional, consisted simply in giving to the municipality the exclusive control over the erection of any such appliances in the streets instead of the prior qualified control. In this case the original 'mode' of use was determined by agreement without action by the Probate Court.

"The prayer of the petition was that because of the dismantling of the street lighting plant and of its refusal to agree to reasonable rates for the future, all rights of the company in the streets should be declared forfeited and that it should be ordered to remove from them all of its constructions, but the decree of the Court of Appeals, affirmed by the Supreme Court, went to the extent, only, of restraining the company from erecting any poles and wires in the streets 'until the consent of said village shall have been obtained.' There was nothing in the decree affecting the maintenance or renewal of such poles and wires as were in use for private lighting, when the case was commenced, and that this omission was of deliberate purpose appears from the fact that both courts held that the state statutes in force at the time the grant became effective, and the form of the proceeding, were such, that a decree annulling such rights as the company had then retained in the streets could not properly be entered in the cause. On this point the Supreme Court said:

" 'In this posture of the case, while in view of the statutory provisions which were in force at the

inception of the enterprise by the village would not be entitled to annul the company's rights, still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandoned without the consent of the village in accordance with existing law.'

"From this state of the record we conclude that the state Supreme Court did not intend to deal with the right of the company to maintain, repair or replace such poles and wires as it was using for commercial lighting when the case was commenced, but that its injunction was intended to prohibit restoring of the street lighting poles and wires which had been taken down and all new additional construction 'until the consent of said village shall have been obtained,' and, so restrained, its judgment will be affirmed, based, as it is, upon the statute of 1896, which the court holds, upon abundant reason and authority, was passed in a reasonable exercise of the police power of the State.

"This act was a general one, applicable to all electric lighting companies then operating, or which might thereafter operate, in the State, and all that it did was to give to the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, instead of the like control which they had when the franchise was granted, but subject to resort to the Probate Court in case of disagreement with the company as to the 'mode' of using the streets.

"We cannot doubt that the danger to life and property from wires carrying high tension electric current through village streets is so great that the subject is a proper one for regulation by the exercise of the police power and very certainly the authorities of the municipality immediately interested in the safety and welfare of its citizens are a proper agency to have charge of such regulation. Any modification

of its rights which the company may suffer from this law passed in a reasonable exercise of the police power does not constitute an impairing of the obligation of its contract with the State or village and is not a taking of its property without due process of law within the meaning of the constitutional prohibition. *Northern Pacif. Ry. Co. v. Puget Sound & Willapa Harbor Ry. Co.*, 250 U. S. 332, and cases cited.

“Of the contention that if an ordinance passed in 1915 by the village, repealing the ordinance of 1889, were given effect it would result in impairing the obligation of the contract, it is enough to say that it first appears in a supplemental answer filed in the Court of Appeals, and the case, as we have seen, was disposed of on the assumption that all of the allegations of the petition were sustained by the evidence. No effect whatever was given to that ordinance, either by the Court of Appeals or by the Supreme Court, but each reached the conclusion we are reviewing independently of, and without reference to it. *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 639; *Long Sault Development Co. v. Call*, 242 U. S. 272, 277.

“It results that, since the change of law complained of did not impair any federal constitutional right of the plaintiff in error, the judgment of the Supreme Court of Ohio, restrained to the scope of its opinion, as we have interpreted it, must be affirmed.”

Now the Supreme Court of Ohio holds that said Act of 1896 made the state grant to The Orrville Light, Heat and Power Company non-assignable without the consent of the Village, saying, (R. 206):

“If it was a state right it could not at the time of the attempted assignment to Renneckar in 1907 be transferred without the consent of the state. If it was a special franchise from the village it could not after 1896 be exercised by an assignee without the consent of the village.”

Again, the Supreme Court of Ohio says: (R. 209)

"In other words, in the amendment of 1896 the state, so far from consenting to the assignment of the right to erect and maintain electric equipment in the streets of Orrville, limited the right of such assignment because it conditioned such maintenance thereafter upon the consent of the municipality. Hence the assignment of 1907 was not effectual to transfer to Renneckar the right to operate in the Village of Orrville. Moreover, since electric companies, after 1896, were prohibited by the state from operating in municipalities without their consent, after that date the assignee of the Orrville Light, Heat and Power Company, which operated without the consent of the village, was operating without the authority of the state of Ohio."

To summarize the distinction between the interpretation placed upon said Act of 1896 in said *Hardin-Wyandot* case and the interpretation now placed upon the same in the case at bar and the different situations presented in the two cases:

(1) In the *Hardin-Wyandot* case:

(a) The "consent" of the municipality was held to refer not to the *grant of the right* to use the streets but merely to *regulation* of the *mode of use* under the police power.

(b) This question of the "mode of use" applied only to the rebuilding of the abandoned street lighting system, the poles and wires of which had been taken down and removed from the streets.

(c) The balance of the plant and distribution system used for general commercial or private lighting and power purposes was not affected by the judgment.

(d) The right of assignment of the original franchise was not questioned, although it appears in the record that the original grant was made to another

company and assigned to The Hardin-Wyandot Lighting Company.

(e) The ordinance passed by the Village of Upper Sandusky in 1915 was not considered for the reason that neither of the state courts gave any effect to the same.

(2) In the case at bar:

(a) The Court held that the "consent" of the municipality meant a franchise grant similar in character to that required in order to originally obtain the franchise.

(b) The question of the "mode of use" was not at issue as the same had been agreed upon many years before during the operation of the plant by Gans and Wilson, and The Orrville Light, Heat and Power Company from 1892 to 1907.

(c) It was conceded that the company had not abandoned its franchise rights with respect to either its street lighting system or its commercial lighting and power service.

(d) Such "consent" to the assignment of the franchise constituted a limitation or a condition upon its further continuance and enjoyment.

(e) All of the property, rights and franchises of the Company were affected by said judgment, in that it ousted the Company from all of its rights in the streets, including its general commercial or private lighting and power business.

(f) The ordinance and resolution of 1923 passed by the Village of Orrville were held to have the effect to terminate and annul all of the rights in the streets of Orrville.

The plaintiff in error makes special claim of error with respect to the radical and fundamental change made by the Supreme Court of Ohio in the case at bar in the in-

"In this statute the legislature certainly revoked whatever right had been given to public utilities to occupy streets in a municipality without the consent thereof, and as under the Constitution the legislature was authorized to revoke such rights theretofore granted, the revocation became effectual upon the effective date of the amendment."

In the opinion handed down after October 10, 1925, (in R. 264, at page 207) the Court modified the above holding saying:

"This revocation was not retroactive and did not affect state grants theretofore given, including that secured by the Orrville Light, Heat and Power Company in 1893."

Subsequent legislation which requires a company having a grant from the state to apply to and obtain the consent of the municipality within which it operates, in order that it may have the right to continue operation therein, impairs the obligation of the contract. In *Russell vs. Sebastian*, 233 U. S. 195, Section 19 of Article XI of the State Constitution of California, as amended in 1884, granted directly a franchise to companies engaged in supplying a municipality with water or artificial light, and under such general regulations as the municipality may prescribe. In 1909 The Economic Gas Light Company commenced operations in the City of Los Angeles. On October 10, 1911, said Section 19 of the Constitution was amended so as to read, in part, as follows:

"Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law \* \* \*."

Thereupon by ordinance approved October 26, 1911, the City of Los Angeles provided that no one should exercise

terpretation of the Act of 1896, namely, that such act has the effect to make all rights theretofore granted non-assignable without the consent of the Village, inasmuch as the plaintiff in error purchased the Orrville plant in the year 1921, relying upon the interpretation made by the Supreme Court of Ohio in 1916, and as finally restrained and interpreted by this Court in 1919.

In the application for rehearing the complaint was that the interpretation placed upon said Act of 1896 had the effect to completely annul and revoke the rights of the Company. After the denial of the application for rehearing, the Supreme Court of Ohio placed its decision not upon the ground that the Act of 1896 was retroactive and *ipso facto* revoke the rights of the Company, but that it had the effect to make such rights non-assignable without the consent of the Village. In the petition for writ of error, the Company made specific complaint with respect to this change, and in the interpretation of the Act of 1896, in that it had purchased the Orrville plant upon the assumption that the law had been settled in the *Hardin-Wyandot* case. (R. 102). Likewise in the assignment of errors (R. 109, 110) and in the statement of points relied upon (R. 219, 220) the same complaint is made. The objection made may be raised in the state court after the handing down of the opinion. *Tidal Oil Co. vs. Flanagan*, 263 U. S. 444.

This question was raised by the plaintiff in error at the first opportunity presented. It will be recalled that in the original opinion handed down by the Supreme Court of Ohio (R. case No. 210, 192 to 201) the Act of 1896 was given a more sweeping and drastic meaning in that it was held to have itself revoked and annulled all of the rights theretofore granted. At page 196 of the record, in case No. 210, the Supreme Court of Ohio said:

any franchise or privilege without having obtained a grant from the City in accordance with the City's charter, and later provided that it should be unlawful to make any excavation in the streets unless the applicant for a permit showed legal authority to use the streets. On February 23, 1912, the Company applied to the proper board for permission to excavate in certain streets. Permission was refused unless the Company first sought and obtained a franchise by purchase, in accordance with the ordinance of October 26, 1911. Thereupon the Company notified the board that it would extend its mains and requested the board to superintend the work. While proceeding to open a trench for its mains it was stopped by the arrest of the plaintiff in error. This Court held that the Company had received directly from the state a franchise, and that it was entitled to continue to lay pipes in the streets and could not be prevented from doing so by subsequent legislation impairing the grant, saying, at page 197:

"The amendment of 1911 to Sec. 19 of Art. XI of the California constitution of 1879 as amended in 1884 and municipal ordinances of Los Angeles adopted in pursuance thereof, were ineffectual under the contract clause of the Federal Constitution to deprive a corporation which had accepted the offer of the State, contained in Sec. 19 before the amendment, of its right to continue to lay pipes in the streets of Los Angeles in accordance with the general regulations of the municipality in regard to such work."

The Orrville Light, Heat and Power Company under its state grant was entitled not only to continue to operate in the Village of Orrville, but also to assign its franchise to its successor, and a statute making its right of assignment dependent upon the consent of the village was imposing a condition which the state had no right to exact. In *Frost vs. Railroad Commission of Cal.*, 271 U. S. 583, (decided

June 7, 1926) it was held that a law of California as construed and applied by the Supreme Court of that state, in prohibiting private carriers from use of state highways unless the consent of the railroad commission is obtained, and in compelling such private carriers to become public carriers, was in violation of the due process clause of the Fourteenth Amendment.

In *Grand Trunk Western Railway vs. South Bend*, 227 U. S. 544, it was held that where a railway was granted the right to lay a double track through a street, the city had no authority to repeal the franchise as to the double track and limit the use to a single track, and that the repealing ordinance impaired the contract and was unconstitutional. This case is a most comprehensive review of all of the decisions which distinguish between the exercise of the police power under proper regulations, and unconstitutional limitation upon or prohibition of the use of a franchise which is not regulative but destructive, saying, at page 553:

“These, however, are examples of the persistence of the power to regulate and do not sustain the validity of the repealing ordinance of 1901, since it is not regulative of the use but destructive of the franchise.”

In *Boise Water Co. vs. Boise City*, 230 U. S. 84, it was held that a later ordinance which imposed license fees or rentals upon the right to use and enjoy a franchise granted prior thereto, was an impairment of the vested street easement of the company and in contravention of the Federal Constitution, saying, page 85:

“The municipal ordinance of a town in Idaho imposing additional obligations on a corporation holding by assignment an easement granted by a former municipal ordinance within fifty years for use of the streets for water mains held an unconstitutional impairment of the obligation of the contract of the former ordinance.”

The right to annul and destroy the franchises of the plaintiff in error is not reserved to the legislature under Section 2 of Article I, nor Section 2 of Article XIII of the Constitution of Ohio. Section 2 of Article I provides, in part, as follows:

“and no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly.”

Section 2 of Article XIII reads, in part, as follows:

“Corporations may be formed under general laws but all such laws may from time to time be altered or repealed.”

The general rule laid down by this Court with respect to the constitutional right of legislatures to alter, amend and repeal their laws was announced in the leading case of *Holyoke Co. vs. Lyman*, 15 Wall. 500, (1872), where it is said:

“2. The provision of the Revised Statutes of Massachusetts, chapter 44, section 23, and General Statutes, chapter 68, section 41, declaring that acts of incorporation shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature, reserves to the legislature the authority to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or other public or private rights.”

In the *Sinking Fund* cases, 99 U. S. 700, (1878) at page 720, it is said:

“That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.”

In *Shields vs. Ohio*, 95 U. S. 324, Mr. Justice Swayne said:

“Alterations must be reasonable; they must be made in good faith and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.”

In *New York and New England Railroad vs. Bristol*, 151 U. S. 556, it is said:

“A power reserved by a statute of a state to its legislature, to alter, amend, or repeal a charter of a railroad corporation, authorizes the legislature to make any alteration or amendment of a charter granted subject to that power, which will not defeat or substantially impair the object of the grant or any rights vested under it.”

In *Adirondack Railroad Co. vs. New York*, 176 U. S. 335, with respect to the right of the legislature to take away from a company the right of exercising the right of eminent domain, it was said:

“While the legislative power to amend or repeal a statute cannot be availed of to take away property already acquired, or to deprive a corporation of fruits of contracts lawfully made already reduced to possession, the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and, when unexecuted, cannot be held to be in itself a vested right surviving the existence of the franchise, or an authorized circumscription of its scope.”

In *Bienville Water Supply Co. vs. Mobile*, 186 U. S. 212, the question related to the exclusive franchise of the company to supply water, and it was said that the rights of corporations grouped themselves into three cases: (a) the right to tangible property; (b) the right to do specific

things with the tangible property, and (c) the right to exclude others from doing like things. No attempt was made to take away the rights specified in the first two classes, and with respect to the third class, the court said that under the constitution of the state an exclusive franchise was unlawful, and that even if the exclusive franchise was given, the monopoly feature thereof would always be subject to revocation. Such right of alteration and amendment, however, does not exist where the municipality agrees for a definite period of time to grant such exclusive franchise.

*Vicksburg vs. Vicksburg Waterworks Co.*, 202 U. S. 453, 464, 465.

In *Owensboro vs. Cumberland Telephone Co.*, 230 U. S. 58, the city charter reserved the right to amend and repeal. It was said, at page 58:

“A reservation to alter or amend in a municipal ordinance granting rights in the streets to a corporation to carry on a public utility as the necessities of the city demand, is simply a reservation of police control incidental to the unabridgable police power and does not reserve a right to revoke or repeal the ordinance itself.”

Speaking of the provision in the charter, the court, at page 73, said:

“This clause of the charter in the instant case reserves no more than the power to repeal, as well as to make and amend ordinances, but by no means operates to convey the power to ‘repeal’ a grant of street rights which had been accepted and had thereby become a contract under the protection of the contract clause of the Constitution. That the right may be reserved to destroy a contract may be conceded; but when such a right is claimed, it must be clear and explicit. The contention here advanced, if conceded, would paralyze the contractual power of the city, for if it has application to this ordinance, it would equally apply to

every other contractual ordinance which the city might enact, though the contract had been accepted and expenditures made."

In *Superior Water Co. vs. Superior*, 263 U. S. 125, the State of Wisconsin undertook to substitute in place of the franchise of the company an indeterminate permit under the Wisconsin public utilities act. This Court again reviewed the leading cases referred to above and held that the reservation in the State Constitution did not authorize the substitution of an indeterminate permit, for the franchise of the Company. The provisions of Section 1 of Article XI of the Constitution are similar to those in Ohio, and the Wisconsin Supreme Court in *State vs. Railroad Commission*, 140 Wis. 145, 157, said:

"The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control and does not authorize interference with property rights vested under the power granted \* \* \* the reserve powers stop short of the power to divest vested property rights \* \* \*."

The Supreme Court of Ohio prior to the decision in this case seems to have recognized and accepted the same view of the law as in the case of *Ohio vs. Neff*, 52 O. S. 375 (decided March 12, 1895). It is said, at page 406:

"Whatever difficulties have been encountered by the courts in ascertaining the limits of this reserved legislative power, they concur in denying that under it, the legislature can strip a corporation of its rights of property.

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the

guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases. *Shield v. Ohio*, 95 U. S. 324; *Detroit v. Plank Road Co.*, 43 Mich., 140; *Orr v. Bracken Co.*, 81 Ky. Rep. 593."

Furthermore, neither the Act of January 26, 1887 (84 O. L. 7) granting the state franchise, nor the ordinance of the Village of Orrville passed February 1, 1892, reserved any power whatsoever to repeal the grants, nor to limit or modify the terms thereof.

These grants having been duly accepted by the grantees vested in them property rights in the nature of easements in the highways of the Village of Orrville, which neither the legislature of Ohio nor the Village of Orrville may constitutionally impair.

We submit, therefore, that the judgment of the Supreme Court of Ohio under review in this case, impairs the obligation of said contract, and that the same should be reversed and judgment rendered for the plaintiff in error.

Respectfully submitted,

FRANK M. COBB,  
FRANKLIN L. MAIER,  
C. H. HENKEL,

*Attorneys for Plaintiff in Error.*

**APPENDIX.**

No. 18784.

**In the Supreme Court of Ohio**

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**THE OHIO PUBLIC SERVICE COMPANY,***Plaintiff in Error,*

vs.

**THE STATE OF OHIO EX REL. JOSEPH O. FRITZ,  
PROSECUTING ATTORNEY, WAYNE COUNTY, OHIO,***Defendant in Error.*

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**APPLICATION FOR REHEARING.**

(Filed June 29, 1925. Original Transcript filed in  
Supreme Court of United States, p. 282.)

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This application is made because counsel for plaintiff in error believe that they have failed to sufficiently discuss and urge upon the Court the source and nature of the franchises of electric light and power companies in Ohio, and failed to fully and properly present all matters tending to show the right and authority of plaintiff in error and of its predecessors under its franchise from the State of Ohio.

Furthermore, it is possible that the various lighting contracts with the Village of Orrville were urged to such an extent, as to lead the Court to believe that the franchise from the state was not particularly relied upon by plaintiff in error.

It seems clear that the decision of this Court proceeds upon the theory that the bases of the claims of plaintiff in error are the various contracts and ordinances of the Village of Orrville, as the syllabus in this case deals with the rights of the plaintiff in error as if the same vested exclusively upon a municipal contract. Nothing is said in the syllabus with respect to state franchises. The judgment of the court ousting plaintiff in error from any rights in the streets, however, denied to plaintiff in error its state franchise which it received by assignment from its predecessor, the Orrville Light, Heat & Power Company. Although both questions are raised by the pleadings, discussed by the court and necessarily decided by the judgment of ouster, yet there is no announcement of the law of Ohio with respect to the rights of electric lighting companies under the Act of January 26, 1887 (84 O. L. 7), in the syllabus of the case.

This case is one of great general interest to the legal profession and already many inquiries have been made by counsel representing utilities who are much disturbed by the law as announced in the syllabus and opinion in this case. Its importance to the various utilities engaged in the business of furnishing electricity for light, heat and power in the State of Ohio is obvious, likewise its effect upon the further development of that business and the extension of their facilities and service to the public.

We respectfully urge upon the Court that the announcement in the opinion is contrary to the decision of this Court in the *Hardin-Wyandot Lighting Company vs. The Village of Upper Sandusky*, 93 O. S. 428 (decided February 15, 1916), which has been the law of Ohio for over nine (9) years.

In the *Hardin-Wyandot* case the rights of the company which were acquired in the year 1889 under said Act of

January 26, 1887, were sustained by this Court, and upon error proceedings by the Supreme Court of the United States (251 U. S., 173). The state franchise with respect to commercial power and general lighting was sustained and that company is still operating under such state grant. Although this Court held that the Act of April 21, 1896 (amending Section 3471-a R. S., now Sections 9192-9193, General Code) required the "consent of such municipality" to the erection of poles and wires in the streets, yet the Supreme Court of the United States interpreted the "consent of such municipality" to refer to the exercise of its police power and not to the granting of a right or franchise. Neither court held that the Act of 1896 revoked the state right acquired in 1889. This Court held that the Act of 1896 required in the future a grant or franchise from the municipality to erect additional poles and wires. That interpretation however was "restrained" or modified by the Supreme Court of the United States, which held that such "consent" related only to the exercise of police power as to the mode and manner of using the streets.

In the presentation and argument of the case at bar we had assumed that the decision of this Court in *The Hardin-Wyandot Lighting Company vs. Village of Upper Sandusky*, 93 O. S., 428, as "interpreted and restrained" by the Supreme Court of the United States, 251 U. S., 173, had settled the law in Ohio with respect to the franchises of electric light and power companies. The decision of this Court was rendered on February 15, 1916, and by the Supreme Court of the United States on December 15, 1919.

Whether by reason of our failure to point out and impress upon this Court the real nature and full significance of that case or otherwise, we are unable to come to any other conclusion, and we say it with the utmost respect, that the Court has apparently misunderstood that

case and consequently has failed to give to it its controlling effect in the case at bar. There is no intimation from the Court that that case was wrongfully decided. On the contrary, it is cited in the opinion with approval on the proposition that the franchises of electric lighting and power companies came from the State of Ohio under the Act of January 26, 1887 (84 O. L. 7). Although the first paragraph of the syllabus is quoted, it is an extraordinary fact that the *Hardin-Wyandot* case, although as near like the case at bar as two cases could possibly be, was referred to in no other part of the opinion of the court, *and most extraordinary of all, the decision of the Supreme Court of the United States in the same case, which "interpreted and restrained" the judgment of this Court, is not mentioned at all.*

The *Hardin-Wyandot* case as "interpreted and restrained" held:

1. That in the year 1889 the franchises of electric light and power companies came directly from the State of Ohio, and that the municipalities enjoyed no franchise-granting powers. This Court held that there was no statute conferring such power on the municipality except the Act of May 12, 1886 (83 O. L.), which was repealed by implication by the Act of January 26, 1887 (84 O. L. 7); (93 O. S., 438, 439).

2. That prior to the passage of the Act of 1896, the control over the erection of poles and wires in the streets was subject to the agreement of the municipality and the company, and in the event of failure to agree, was vested in the Probate Court. This control related to the mode of use of the streets and was an exercise of the police power of the municipality in the discharge of its duty to keep the streets open, in repair and free from nuisance. Upon this

proposition, this Court and the Supreme Court of the United States were in complete agreement.

3. That since the passage of the Act of 1896 the "exclusive control over the erection of any such appliances in the streets instead of the prior, qualified control" was vested in the municipality. This quotation is from the Supreme Court of the United States (251 U. S., 176) and is an interpretation or modification of the construction put upon that Act by this Court, which failed to clearly distinguish in its opinion between such control under the exercise of the police power and the right of the municipality to make a franchise grant. Although there is language in the opinion of this Court indicating that "municipality control alone" and "consent of such municipality" referred to the franchise-granting power, yet the Supreme Court of the United States clearly and distinctly held that the decision of this Court with respect to the meaning of the Act of 1896 merely gave

"to the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, instead of the like control which they had when the franchise was granted, but subject to resort to the Probate Court in case of disagreement with the company as to the mode of using the streets." 251 U. S., 178.

They say that the judgment of this Court is that the statute of 1896 was passed in a "reasonable exercise of the police power of the State." Such control "is a proper one for regulation by the exercise of the police power."

It must be noted here that the Court interprets the statute of 1896 as granting to municipalities *only* power to regulate *under the exercise of its police powers the use of its streets by electric companies, but does not hold that*

under its provisions a municipality has the right to *terminate* a state grant. The Court says on pages 177-178 as follows:

“\* \* \* There was nothing in the decree affecting the maintenance or renewal of such poles and wires as were in use for private lighting, when the case was commenced, and that this omission was of deliberate purpose appears from the fact that both courts held that the state statutes in force at the time the grant became effective, and the form of the proceeding, were such, that a decree annulling such rights as the company had then retained in the streets could not properly be entered in the cause.

On this point the Supreme Court of Ohio said:

‘In this posture of the case, while in view of the statutory provisions which were in force at the inception of the enterprise the village would not be entitled to annul the company’s rights, still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandoned without the consent of the village in accordance with existing law.’

From this state of the record we conclude that the state Supreme Court did not intend to deal with the right of the company to maintain, repair or replace such poles and wires as it was using for commercial lighting when the case was commenced, but that its injunction was intended to prohibit restoring of the street lighting poles and wires which had been taken down and all new additional construction ‘until the consent of said village shall have been obtained,’ and, so restrained, its judgment will be affirmed, based, as it is, upon the statute of 1896, which the court holds, upon abundant reason and authority, was passed in a reasonable exercise of the police power of the State.”

4. That the Act of 1896 was merely prospective and required the company to submit to "municipal control" with respect to the restoring of street lights, poles and wires which had been taken down and all new additional construction. That the Act of 1896 was not retroactive, as shown by the above quotation.

This interpretation is in entire accord with the opinion of this Court in the same case, which held that the Act of 1896 operated prospectively only. (93 O. S., 442)

5. That the original franchise of The Citizens Electric Light and Power Company, which was incorporated in 1889, received from the State of Ohio under the Act of 1887, was assignable and passed by assignment in 1912 to The Hardin-Wyandot Lighting Company. Both courts were in entire agreement on this proposition.

The decision in the *Hardin-Wyandot* case, as "interpreted and restrained" by the Supreme Court of the United States, left the company in full possession and enjoyment of its franchise received through the predecessor from the State of Ohio in the year 1889 with respect to the streets occupied by its poles and wires for general lighting and power purposes. It merely subjected that company to the exercise of the police control of the municipality with respect to new additional construction in the streets, including the restoration of the street lighting system. If that court had interpreted the decision of this Court to mean that the Act of 1896 revoked the state grant, or vested in the municipality the power to veto or destroy the state grant by refusing to exercise its control, then there is no doubt that the Supreme Court of the United States would have declared the Act of 1896 an impairment of the contract rights of the company. That court took particular pains to say that from the state of the record they con-

cluded that the state court intended to deal only with the exercise by the municipality of its police power, "and so restrained, its judgment will be affirmed, based as it is upon the statute of 1896, which the court holds, upon abundant reason and authority, was passed in a reasonable exercise of the police power of the state." (251 U. S., 178) And the Court concludes with the following sentence (page 179):

"It results that, since the change of law complained of did not impair any federal constitutional right of the plaintiff in error, the judgment of the Supreme Court of Ohio, *restrained to the scope of its opinion, as we have interpreted it*, must be affirmed." (Italics ours.)

**AN ANALYSIS OF THE PRESENT OPINION PRESENTS SOME APPARENT INCONSISTENCIES WHICH ARE IN DIRECT CONFLICT WITH THE DECISION IN THE HARDIN-WYANDOT CASE, AND WHICH IF NOT CORRECTED WILL HAVE A DISASTROUS EFFECT UPON PROPERTY RIGHTS ESTABLISHED AND ENJOYED UNDER THE FORMER DECISION.**

The decision announces:

1. That electric light and power companies acquired under the Act of January 26, 1887, "the general right to erect their equipment within the public highways," but that "these sections, however, did not confer upon the Orrville Light, Heat & Power Company any *special rights* in the streets of the City of Orrville." (Italics ours.)

It is not clear what was intended by the words "general right" and "special rights"—whether a franchise right was received, as held in the *Hardin-Wyandot* case, or not. In view of the later declaration that whatever

rights were received, were revoked by the Act of 1896, the court evidently felt that it was of little importance to determine what those rights were.

2. The question whether the power vested in municipalities prior to 1896 related merely to the exercise of the police power in the control of the streets, received little or no attention.

3. The Act of 1896 was interpreted as revoking whatever rights the Company had received under the Act of January 26, 1887. The language of the court is:

“In this statute the legislature certainly revoked whatever right had been given to public utilities to occupy streets in a municipality without the consent thereof, and as under the constitution the legislature was authorized to revoke such rights theretofore granted, the revocation became effectual upon the effective date of the amendment.”

4. The Act of 1896 was held to be retroactive in its operation. The judgment of ouster deprived the plaintiff in error of all rights in the streets of the Village of Orrville, including the right to use and enjoy the general commercial and lighting system, which had been in operation since the year 1892, a period of thirty-one years.

5. The decision, apparently, is based upon the street lighting contracts made from time to time between the Village and the Company, and ignores the franchise right to occupy the streets granted by the state.

There appears a hopeless confusion in the syllabus, and throughout the decision between such contracts which are assumed to be franchises, and the real State franchise itself.

6. That the franchise of The Orrville Light, Heat & Power Company, which had been assigned to various parties and finally purchased by the plaintiff in error, was

not assignable "without the consent of the Village," and as such "consent" had never been given to The Massillon Electric & Gas Company nor to the plaintiff in error, such franchise was never legally acquired by plaintiff in error.

7. The mere recitation of these holdings in the two cases demonstrates without argument that the decision in the case at bar is irreconcilably at variance with the decision of this Court in the *Hardin-Wyandot* case as "interpreted and restrained" by the judgment of the supreme Court of the United States. The interpretation put upon the Act of 1896 in the case at bar makes the same retroactive, although formerly it was prospective only in its operation. It gives to such Act an entirely different meaning, in that now such Act is construed to vest a franchise-granting power in the municipality, although formerly it meant merely that the municipality was to have sole control under its police power with respect to lighting equipment in the streets. And finally it strikes down and destroys rights acquired under the Act of January 26, 1887, which formerly had been sustained as valid franchises.

It is our sincere belief and it is for that reason that we are urging this application for rehearing, that:

First: The Court in the case at bar failed to understand the contention of the plaintiff in error that its franchise in the streets of Orrville came to it from The Orrville Light, Heat and Power Company under the Act of January 26, 1887, from the State of Ohio.

Second: This Court, although not passing upon such state franchise in the syllabus, yet by reason of the judgment of ouster denied the same for the reasons set forth in the opinion; namely, that if such a state right accrued to The Orrville Light, Heat and Power Company yet such right was revoked and annulled by the Act of 1896. This interpretation of the Act of 1896 is at variance with the decision of this

court in the *Hardin-Wyandot* case and of the decision of the Supreme Court of the United States in the same case.

Third: The Court failed to understand the contention of plaintiff in error that its franchise received in the year 1893 from the State of Ohio under said Act of January 26, 1887, being indeterminate as to its duration, was a perpetual franchise under the decision of the Supreme Court of the United States in the case of *The Northern Ohio Traction and Light Company vs. State of Ohio*, 245 U. S. 574. As the Constitution of the United States is the supreme law of the land, this decision of the Supreme Court of the United States determines the law of Ohio and should be followed by this Court. It is true that the rule as to indeterminate grants as laid down by this Court in *East Ohio Gas Company vs. Akron*, 81 O. S. 33, followed in the *Northern Ohio Traction* case and in the case at bar is exactly contrary to the rule as laid down by the Supreme Court of the United States in *Owensboro vs. Cumberland Telephone and Telegraph Company*, 230 U. S. 58; *Louisville vs. Cumberland Telephone*, 224 U. S. 649, and in the *Northern Ohio Traction and Light* and other cases. As the Ohio rule was not announced until October, 1909, in *East Ohio Gas Company vs. Akron*, 81 O. S. 33, all indeterminate grants in Ohio made prior to that time are to be interpreted by the United States rule. In other words, the law of Ohio prior to October, 1909, with respect to indeterminate grants is governed by the rule that such a grant is a contract not subject to annulment at the will of the granting authority. Of course, this rule is subject to the qualifications that there are no controlling provisions in the state constitution or in the statutes holding that such state grants may be revoked at the will of the granting authority. Although in the statutes relating to grants by county commissioners of franchises over public roads, there may have been some grounds for limiting such rights to twenty-five (25) years, yet there is no provision in the Act of January 26, 1887, relating to state grants

to electric light and power companies which limits the duration of such rights. The case at bar, therefore, presents a perfect case for the application of the rule in the *Northern Ohio Traction Company* case which rule was denied any application in the case at bar on account of the misapprehension of this Court that the rights of plaintiff in error depended on a franchise from the municipality of Orrville.

The salient and controlling admitted facts in the case at bar are that on January 3, 1893, The Orrville Light, Heat and Power Company was organized under the laws of the State of Ohio for the purpose of manufacturing and selling electricity in the Village of Orrville, Ohio; that said company acquired the property and rights of Gans and Wilson, who had built, in 1893, an electric light plant in said village under an ordinance of said village agreeing and consenting thereto; that said The Orrville Light, Heat and Power Company and its successors and assigns, including the plaintiff in error, continued to maintain and operate said electric lighting plant to furnish electricity for commercial and residential use in said village until June 18, 1923, the date of the alleged revoking ordinance.

The contention of the plaintiff in error is in brief that it acquired through its predecessors a state franchise in the year 1893; that it accepted such state grant, made its investment and continued to operate its electric lighting plant and furnish service to the public until the Council of Orrville in 1923 undertook to revoke such right. No discussion is required that if such state right arose, the municipality was wholly without power to annul or revoke the same.

The revocation of the state franchise rests solely upon the act of the Legislature of Ohio passed in 1896. It is with utmost confidence that we request the Court to re-

examine this holding in the light of the *Hardin-Wyandot* case. It is impossible to interpret that case as deciding that the "consent of the municipality" applied to past grants which had been accepted and converted into franchise rights. Its operation was purely prospective and as interpreted by the Supreme Court of the United States related not to franchise-granting power but to the exercise of the police power with respect to the mode of the use of the streets.

If the Court arrives at the conclusion which we are suggesting, it disposes of the difficulty which was in the mind of the judge who wrote the opinion, viz.: that the franchise right of The Orrville Light, Heat and Power Company was not assignable without the consent of the Village of Orrville. This objection to the assignability rested solely upon the proposition that the franchise rights came from the municipality and that if a new company could not acquire a franchise without the consent of the village, likewise the successor of the old company could not acquire such a franchise without its consent. If, in 1896, the state merely restored to the municipality its police power and did not confer upon it any franchise-granting power, then the right of plaintiff in error to the enjoyment of the franchise depends merely upon the various deeds and contracts with its predecessors and is in no way dependent upon securing a new "consent" of the village. Franchises to use public streets are contractual and proprietary. They constitute vested contract rights and can be assigned like other property. In *Louisville vs. Cumberland Telephone and Telegraph Company*, 224 U. S., 648, on page 661, the court said:

"For while franchises to be are not transferable without express authority, there are other franchises to have, to hold and to use which are contractual and

proprietary in their nature and which confer rights and privileges which can be sold wherever the company, as here, has power to dispose of its property. In the present case the Ohio Valley Company was by its charter given authority to mortgage and dispose of franchises. Among those thus held was the right to use the streets in the city for the purpose necessary in conducting a telephone business. Such a street franchise has been called by various names—incorporeal hereditament, interest in land, an easement, a right-of-way, but however designated, it is property \* \* \* Being property, it was taxable, alienable and transferable, and as property, passed to the Cumberland Telephone & Telegraph Company \* \* \*."

The error into which the Court has fallen may be the result of our pressing upon the Court's attention the contract made between the Village and Gans and Wilson, their associates, successors and assigns, in 1892, without fully explaining our views in regard thereto and the limited effect thereof.

In 1893, the Orrville Company was incorporated under the laws of Ohio and received its franchise under the Act of 1887. It purchased the plant and equipment of Gans and Wilson and continued to perform their lighting contract with the knowledge and consent of the Village. The Village had under the contract with Gans and Wilson exercised its police powers in regard to supervision of construction in the streets of the Village. The Orrville Company, by purchasing and taking over the property of Gans and Wilson, was in the exercise of its franchise granted by the state, which was indeterminate. It thus appears that as between Gans and Wilson and the Village there was an intention to limit the duration of the street lighting contract to ten years, yet as between the State of Ohio and the Orrville Company there was no intention whatsoever to give and receive a mere revocable right.

Upon the theory of a state franchise, another objection urged in the opinion in the case at bar disappears; namely, that the *Northern Ohio Traction* case does not apply for the reason that the circumstances relating to the passage of the various ordinances by the Village of Orrville show "an intention upon the part of the parties to give and receive a mere revocable right after the expiration of the ten-year period." Under a state grant the parties involved in the contract are the state on one hand and the company on the other. As the Act of January 26, 1887, relating to electric lighting companies does not disclose any intention to give a mere revocable right, the intention of the Village is immaterial and the rule laid down in the *Northern Ohio Traction and Light* case is applicable, to-wit, that the franchise is not subject to annulment at the will of the granting authority.

It is unnecessary to discuss the proposition announced in the opinion, viz.: that under the constitution the legislature was authorized to revoke any rights granted by the Act of January 26, 1887, for the reason that we feel that upon further reflection this Court will adopt the position taken in the *Hardin-Wyandot* case, viz.: that the Act of 1896 cannot be interpreted as annulling or revoking any rights theretofore granted. Of course, it is a settled rule of law that any rights acquired under a state statute and accepted by the grantee constitute property and are not subject to revocation either by an amendment of the statute or of the constitution itself. The provisions of the United States Constitution with respect to the impairment of contracts protect any such contract right. This question was expressly raised and decided in *Russell vs. Sebastian*, 233 U. S., 195, where the state granted a direct franchise and it held that such franchise was not subject to abrogation by an amend-

ment of the constitution conferring upon municipalities the power to grant franchises.

We earnestly request the Court to re-examine the question of the rights of electric lighting companies under the statutes and decisions referred to, as distinguished from the law as announced by this Court in the case of gas companies, whose franchises it is conceded by all are derived from the municipality. Until the announcement in this case, it had never been doubted in Ohio that the franchises of electric light companies came from the state, especially since the decision of this Court in 1909 in the *Hardin-Wyandot* case. For this Court to hold now that such franchises do not come from the state but from the municipality is a distinct shock to those interested in electric utilities and particularly the holding that the Act of 1896 not only vested a franchise-granting power in municipalities but also *ipso facto* annulled and revoked all grants theretofore acquired under the Act of January 26, 1887. The investment of millions of dollars in electric lighting companies in Ohio is jeopardized by this decision. This industry is no longer limited to isolated plants in municipalities, but consists of large generating units situated at advantageous locations and distributing electricity by a vast network of transmission lines over the entire state. We admit that it is no argument to urge the inconvenience of securing municipal contracts to carry on the industry, if the law of Ohio required such contracts, but inasmuch as the investments in the industry have been made upon the law of this state as announced in the *Hardin-Wyandot* case, as interpreted by the Supreme Court of the United States, including the Orrville plant investment by the plaintiff in error in 1921, it seems inconceivable that this Court would now announce any different interpretation of such law. We feel that somehow in the presentation and argument of the case we

were unable to convey to the Court our contentions in this regard, and therefore respectfully request that a rehearing be granted.

C. H. HENKEL,  
FRANKLIN L. MAIER,

*Attorneys for Plaintiff in Error.*

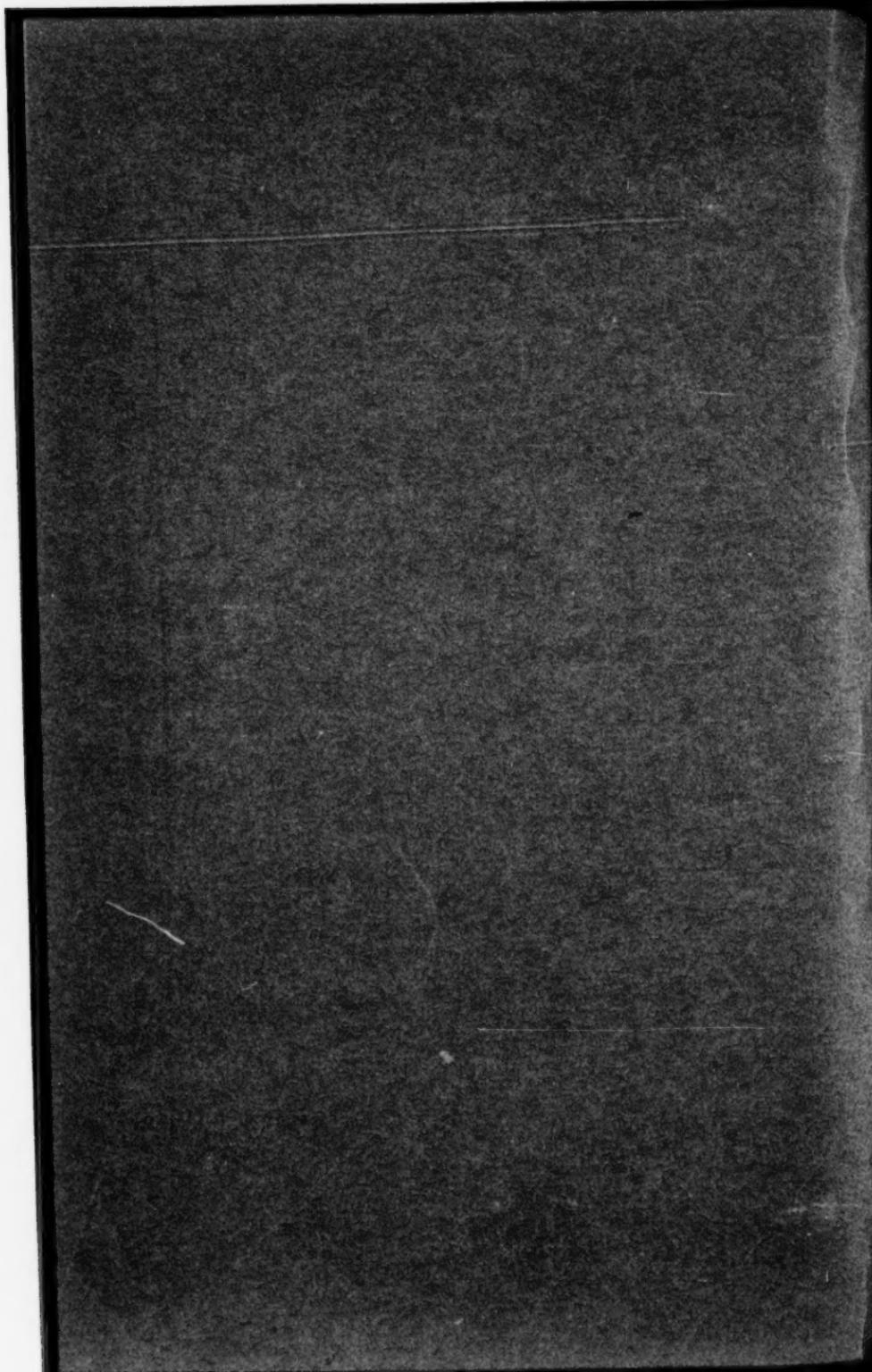
SQUIRE, SANDERS & DEMPSEY,

*Of Counsel.*



Imogen

The State of Ohio vs. Mr. Joseph O. Davis,  
Prominent Attorney of Wayne County, Ohio,  
Defendant in Error.



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# In the Supreme Court of the United States

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OCTOBER TERM, 1926.

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No. 210.

No. 264.

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THE OHIO PUBLIC SERVICE COMPANY,

*Plaintiff in Error,*

vs.

THE STATE OF OHIO EX REL. JOSEPH O. FRITZ,  
Prosecuting Attorney of Wayne County, Ohio,

*Defendant in Error.*

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IN ERROR TO

THE SUPREME COURT OF THE STATE OF OHIO.

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## BRIEF OF DEFENDANT IN ERROR.

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JOSEPH O. FRITZ, Prosecuting Attorney,  
ALTON H. ETLING,  
LYMAN R. CRITCHFIELD,

*Attorneys for Defendant in Error.*

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# In the Supreme Court of the United States

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OCTOBER TERM, 1926.

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No. 210.

No. 264.

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THE OHIO PUBLIC SERVICE COMPANY,

*Plaintiff in Error,*

vs.

THE STATE OF OHIO EX REL. JOSEPH O. FRITZ,  
Prosecuting Attorney of Wayne County, Ohio,

*Defendant in Error.*

---

IN ERROR TO

THE SUPREME COURT OF THE STATE OF OHIO.

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## BRIEF OF DEFENDANT IN ERROR.

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The defendant in error adopts the statements of the plaintiff in error as recited on pages 1 and 2 and the first paragraph of page 3 in plaintiff in error's brief.

### STATEMENT.

The claim of the plaintiff in error that its franchise and right to carry on business of furnishing commercial and private lighting in said Village of Orrville, is not well grounded:

(a) From the State of Ohio under the Act of January 26, 1887, (84 O. L. 7), a Company organized for the purpose of supplying electric light etc. was granted certain rights, but these rights so granted are later subject to the provisions of the Act of the legis-

lature of April 21, 1896, found in Ohio Laws Vol. 92, page 204, in which the State of Ohio delegated its full sovereign power to the municipalities alone to determine who could occupy its streets for supplying electric light etc., and no such power has been granted to the plaintiff in error by the Village of Orrville under said Act.

(b) The plaintiff in error obtained no rights or authority whatever under an ordinance of the Village of Orrville passed February 1, 1892. The rights granted under the statute and the rights granted under said ordinance are not perpetual. The statute gives rights to certain companies incorporated, which rights die with the company and are not assignable. The source of the rights is the State of Ohio to each company by virtue of the incorporation of the company. The State of Ohio never authorized the assignment of the rights granted to any corporation. The State of Ohio never has granted such rights to an individual.

The ordinance of February 1, 1892, purports to give and grant certain franchise rights to two *individuals*. In 1892 no municipality had the right or authority to grant franchise rights of any nature or character, and much more so they didn't have the right to grant a perpetual franchise to anyone; that power to grant rights was retained by the State of Ohio and only was granted to corporations, 84 Ohio Laws, page 7.

#### **THE STATE FRANCHISE.**

The Act of January 26, 1887, (84 O. L., 7, Sec. 3471-a Revised Statutes of Ohio, Sec. 9192 General Code of Ohio) made applicable to electric light and power COMPANIES (and companies only) Sections 3454 to 3471 Revised Statutes, Sections 9170 to 9195 of the General Code, so far as applicable, granted to such companies, and granted such rights to The Orrville Light, Heat & Power Company up-

on its incorporation on January 3, 1893, directly from the State, and such company could and did receive such power and authority from no other source.

### **THE VILLAGE FRANCHISE.**

The ordinance of the Village of Orrville passed February 1, 1892, purported to grant to Aurel P. Gans and Mellville D. Wilson, their associates, successors and assigns, the right to use the streets, lanes, alleys and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light mains and apparatus for the distribution of electricity for light, heat and power, when in truth and in fact they had no right to grant such franchise to the successors and assigns of Aurel P. Gans and Mellville D. Wilson, except such rights as were incident to the contract for lighting the streets of Orrville for a period of ten years and for ten years only, as provided in said ordinance.

As cited in plaintiff in error's brief, the original plant was constructed in 1892 by the individuals therein named in said ordinance and these individuals purported to sell said plant, together with their rights and franchises to conduct business in said Village of Orrville, to the Orrville Light, Heat & Power Company after its incorporation in 1893, when in fact all that they could sell to said corporation was their tangible property, together with their rights under the contract provision of said ordinance, to-wit, the right to furnish lights for lighting the streets of the Village of Orrville until the end of the ten-year period as recited in said ordinance.

On July first, 1907, said The Orrville Light, Heat & Power Company pretended to sell and assign to D. I. Rennecker all of its property and FRANCHISES, when in fact all that they could sell to D. I. Rennecker was the prop-

erty which they owned in said Village of Orrville. The said D. I. Rennecker as an individual could not acquire from the Village of Orrville a right which the State of Ohio under the then existing statutes would not give to an individual, that is, the right granted only to corporations.

On March 11, 1913, D. I. Rennecker pretended to assign and transfer said property and FRANCHISES to The Massillon Electric and Gas Company, when in fact he had no franchise to assign. The said D. I. Rennecker had an uncompleted contract to furnish lights to the Village of Orrville by virtue of the ordinance, beginning 1912, and the incidental and necessarily implied right to use the streets and public places of said Village for that purpose. The only source from which The Massillon Electric and Gas Company could obtain any franchise rights to use the streets, alleys, lanes and public places of the Village of Orrville was from the State of Ohio, with the consent and agreement of the Village of Orrville, which consent from said Village they do not claim to have obtained from the Village of Orrville at the time of the pretended assignment to them by the said D. I. Rennecker, nor at any time.

On October 29, 1921, The Massillon Electric and Gas Company pretended to sell and assign to plaintiff in error, The Ohio Public Service Company, all of said property and FRANCHISES in said Village, when in fact they had no franchise rights in said Village, on account of the refusal of said Village to give their consent and said consent never having been obtained; and any rights which plaintiff in error may have acquired, they acquired directly from the State of Ohio by virtue of their incorporation; they never obtained any rights in the Village of Orrville, because they never obtained the consent of said Village to use the streets, lanes, and public places of said Village,

and do not claim such consent from said Village, except as assignee in the chain of title from Aurel P. Gans and Mellville D. Wilson, which defendant in error denies.

#### **THE ACT OF APRIL 21, 1896.**

The Act of April 21, 1896, (92 O. L., 204) which amended Sec. 3471-a, Revised Statutes, under which said State franchise was granted, specifically prohibited the grantee of said franchise from transferring or assigning the same without the consent of the Village of Orrville. This Act was passed by the Legislature of the State of Ohio and transferred whatever the sovereign power of the State was to grant franchises to the municipalities alone. We claim this statute is constitutional, and not retroactive, and would not affect or deprive The Orrville Light, Heat & Power Company from whatever rights they had obtained by their incorporation in 1893. It did, however, transfer to the municipality of Orrville from said date the right to alone control their streets and no corporation thereafter, April 21, 1896, could use the streets, lanes and public places of said Village without the consent of said municipality; and the plaintiff in error, The Ohio Public Service Company, has never obtained said consent and therefore has no rights in said Village of Orrville.

The Orrville Light, Heat & Power Company purported to sell and transfer to said D. I. Rennecker, an individual, on July 1st, 1907, all their property in the Village of Orrville, both tangible property and claimed franchise rights, and have not functioned or pretended to operate or exist as a corporation since said date, thus terminating and ending in 1907 all such franchise rights which it had obtained from the State of Ohio by virtue of its incorporation. (See Record in Case No. 264, pp. 54, 55, 60 and 62).

The plaintiff in error maintains that this Act is unconstitutional, because it impaired the State grant given to The Orrville Light, Heat & Power Company; but as a matter of fact The Orrville Light, Heat & Power Company are not interested and never were in said Act because of their already vested rights. The contention of the plaintiff in error is not sound, because they maintain that the creature is greater than the creator, that is, that the State of Ohio, from whom all their source of power came by virtue of incorporation, could not, by an act of the Legislature, transfer its sovereign power from itself to a municipality. There are two branches to this proposition:

- (a) That the State did not transfer its sovereign power, that it alone retained the power by virtue of an incorporation to give said corporation the power to use the streets of a municipality; and,
- (b) But also endowed the municipality with the power to decide alone what corporation could operate and use their streets for electrical purposes.

The corporation still needed the power granted by virtue of its incorporation but the State, the creator, made an additional provision endowing the municipality with power alone to decide what corporation thus incorporated could exercise that power on its streets. This is surely not an unconstitutional provision. It is an Act only regulating the State's sovereign power in particular localities, within the state, to-wit, towns and municipalities.

**MUNICIPAL LEGISLATION REPEALING THE ACT  
OF FEBRUARY 1, 1892, AND NOTICE TO  
PLAINTIFF IN ERROR.**

Conceding for the sake of argument only and to answer the argument of the plaintiff in error in its brief, that the plaintiff in error herein had a valid franchise coming down to it by successive assignments from corporations and individuals, conceding that the ordinance of February 1, 1892 granted a franchise which is now held by assignment by the plaintiff in error, which said franchise is claimed to be a contract between the Village of Orrville and Aurel P. Gans and Mellville D. Wilson, their successors and assigns, the plaintiff being a successor, we still claim that said contract did have within its own terms the period of duration, to-wit, ten years; and, for purposes of argument only admitting further that said period of ten years did not apply to the right to use the streets, lanes and public places of said municipality and that there was previous to June 18, 1923 a valid contract existing between the Village of Orrville and the plaintiff in error, yet we claim that we terminated said contract by repealing said ordinance of February 1, 1892 and notice to said plaintiff in error to vacate said streets. We claim said act of the council of the Village of Orrville on June 18, 1923, repealing said ordinance of February 1, 1892 and giving notice to the said plaintiff in error to vacate said streets was a valid enactment of said council and terminated any and all rights which the plaintiff in error might have to said streets; conceding that they had any, and denying that the said ordinance of February 1, 1892 granted any right of which the plaintiff in error is now possessed, we say that said right was terminated by that act of the Village council.

## THE DECISION OF THE SUPREME COURT OF OHIO.

On June 2, 1925, the Supreme Court of the State of Ohio rendered a judgment affirming the judgment of the Court of Appeals of the Ninth Judicial District of the State of Ohio. The opinion of the Court was rendered as of that date and is found published in the official organ of the Supreme Court of the State of Ohio, to-wit, Vol. 113 O. S. R., page 325, where said date of June 2, 1925 is given as the date of the Opinion. There is no other official date of this decision and we presume that this Court will accept the official Opinion of the Supreme Court of the State of Ohio and the date therein stated, to-wit, June 2, 1925.

## JURISDICTION.

**FUST:** The decision of the Supreme Court of the State of Ohio was rendered June 2, 1925. The plaintiff in error attempted to prosecute a writ of error to the Supreme Court of the United States, within the time prescribed by the rules of said Court, to this decision. Afterwards, to-wit, June 29, 1925, the plaintiff in error evidently abandoned its intention to prosecute error from the decision of June 2, 1925, and filed a motion for re-hearing, (Record in Case No. 264, page 114). This motion for re-hearing was overruled on October 10, 1925, (Record in Case No. 264, page 115). The plaintiff in error further, in pursuance of its abandonment of its first prosecution of error to the decision of the Court on June 2, 1925, attempted to perfect a proceeding in error to the Supreme Court of the United States from the overruling of the motion for re-hearing on October 10, 1925, to-wit on Dec. 7, 1925 (R. 115) which was more than ninety days after the decision of the Court on June 2, 1925; and thereby plaintiff in error has prosecuted its error proceedings in filing a writ of error too late to

comply with the rules and regulations of the Supreme Court of the United States, attempting to prosecute error from the decision of June 2, 1925 on December 7, 1925.

Therefore, we hold that the Supreme Court of the United States has no jurisdiction to hear and determine the matter herein involved.

**SECOND:** The defendant in error maintains there is no contract involved herein which the plaintiff in error holds with the Village of Orrville which has been impaired or abrogated by any act of the State of Ohio or of the Village of Orrville in the ordinance of February 1, 1892.

The basis of this contention of the defendant in error is that the plaintiff in error never was the legal assignee of Gans and Wilson to the rights of said ordinance, by assignment or otherwise down through the line of successive assignors under them, as claimed by the plaintiff in error.

If this be true, as claimed by the defendant in error, the Supreme Court of the United States has no jurisdiction to hear and determine the issues involved herein on its merits, as no question of impairment of a contract is involved.

#### **BRIEF.**

The defendant in error admits that the statement of facts as made in the brief of the plaintiff in error is substantially correct so far as it goes; but we claim and desire to call the Court's attention to additional facts as disclosed in the Record in this case, and we call the Court's attention to those facts in connection with our argument as we proceed.

The Act of the Legislature of the State of Ohio on the 12th day of May, 1886, as found in Vol. 83 Ohio Laws, page 143, and the Act of the Legislature of the State of Ohio on

the 26th day of January, 1887, as found in Vol. 84 Ohio Laws, page 7, were in existence and in operation in the State of Ohio on February 1, 1892, when the ordinance passed by the Village of Orrville took effect, and were the only laws on said subject.

On the said February 1, 1892, the State had still retained the authority, its sovereign power, to grant the right to a company or corporation to use the streets, lanes, alleys and public places of municipalities for the establishment of electric lighting systems.

An inspection of these two Acts above mentioned, found in 83 O. L. and 84 O. L., show that the State of Ohio had only endowed *corporations* or *companies* with these rights, so that on February 1, 1892, when Gans and Wilson obtained the franchise from the Village of Orrville they did not obtain by that ordinance any authority from the State of Ohio to use the streets, lanes, alleys and public places of the Village of Orrville, because they were two individuals and not a company or a corporation.

The Act of the Legislature of the State of Ohio, of May 12, 1886, as found in

Vol. 83 Ohio Laws, page 143.

Section I of said Act, states as follows:

“AN ACT.”

“To authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets, and other public places with electricity.

SECTION I. Be it enacted by the General-Assembly of The State of Ohio, That a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manu-

facture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe." etc.

This Act was in force on February 1, 1892, as recognized by the Legislature of the State of Ohio, when Section 2 thereof was amended and Section 1 not repealed, in Vol. 92 Ohio Laws, page 290, on April 22, 1896. This law, as the Court will notice, requires the consent of municipal authorities. This Act continued to be the law of Ohio until repealed by an Act of the Legislature passed October 22, 1902, as found in

Vol. 96 Ohio Laws, beginning on page 20.

The repeal of this law is found on

page 96, and at the bottom of page 102.

It was known in the Revised Statutes of Ohio as 3471-4.

This law found in Vol. 83 O. L., page 143, was recognized by the Legislature of the State of Ohio as a valid and subsisting law of the State of Ohio three times after enactment:

(1) About nine months thereafter in the enactment of the law found in Vol. 84, O. L., page 7, which Act recognized in the body of the law, where it speaks of the chapter relating to magnetic telegraph companies, this original Act in Vol. 83 O. L., page 143, being a part of said chapter;

(2) It was again recognized as a valid and subsisting law on April 21, 1896 when the same was

amended, as found in Vol. 92 O. L., page 204; and the wording of the amendment in 1896 was to confer upon municipalities the power **ALONE**, thus, reasoning by analogy, the municipality must have had a divided authority with the State before that time and it took all the power away from the State as to consent in said amendment of 1896 and conferred it upon the municipalities alone.

(3) Again, October 22, 1902, where this Act and all previous Acts were repealed and a new civil code adopted, as found in Vol. 96 O. L., beginning at page 20. We think it suggestive and potent as to the intention of the Legislature in repealing this statute when it enacted the statute about nine months later, in Vol. 84 O. L., page 7.

This Act found in Vol. 83 O. L., page 143, was also recognized by the compilers of the Statutes of Ohio in 1891, as found in

Vol. I, Smith & Benedicts Statutes of Ohio, 1891,  
where it is numbered 3471-4.

The Act of the Legislature of the State of Ohio of January 26, 1887, as found in

Vol. 84 Ohio Laws, page 7,

Section I of said Act, states as follows:

**“AN ACT”**

“To supplement sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio.

**SECTION 1.** Be it enacted by the General Assembly of the State of Ohio, That the following section shall constitute a section supplementary to sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio, with sectional numbering as follows:

**SEC. 3471 a.** The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the

public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

The Act above quoted was in effect on February 1, 1892. It was amended and incorporated in an Act of the Legislature of April 21, 1896, which Act is found in Vol. 92 Ohio Laws, page 204-205. This Act is also found in Smith and Benedict's Statutes of Ohio, 1891, in Vol. I, Sec. 3471 a.

These two Acts embraced the law in effect when the Ordinance of February 1, 1892 was passed by the council of the Village of Orrville. The second Act above quoted did not repeal the former Act; it states in the beginning, in the caption, that it is an Act to supplement and not an Act to repeal. We take it that the word "supplement" means to add to.

The only rights Gans and Wilson obtained were by virtue of the ordinance of February 1, 1892, at which date the Village of Orrville had only the power to CONSENT to the use of the streets, not in the way of granting of a franchise, but a consent given by virtue of the Act of the Legislature found in Vol. 83 Ohio Laws, p. 143 above quoted, because the Village of Orrville at that time did not have the right to grant a franchise for the use of the streets, except as to the location or manner of using the streets.

Therefore, the rights of Gans and Wilson were not franchise rights granted by the State of Ohio at said time, because the State of Ohio had not yet, and has never in fact, endowed an INDIVIDUAL with corporate power to use the streets of municipalities in said state; and, the Village

of Orrville had not the power at that time, because it was still retained by the State; so that Gans and Wilson had only what the ordinance of 1892 gave them.

The ordinance of 1892 seems to have two propositions:

1. A right to use the streets, granted to Gans and Wilson, for the purpose of erecting poles, wires and electrical apparatus; and,
2. A right to furnish electricity to the Village of Orrville in lighting the streets for a period of ten years.

Plaintiff in error seems to separate these two into two distinct grants, while we maintain that they were one grant in the same ordinance.

In determining what rights Gans and Wilson had, we must go back to the laws as above stated, and see under what laws the Village of Orrville was acting at said time. The Village of Orrville did not have power to grant to Gans and Wilson, beyond that of giving them a contract to light the streets at a certain price for a certain time.

Gans and Wilson, on April 1, 1892 had no authority from the State of Ohio to use the streets, lanes and alleys of the Village of Orrville, it never having been granted to them, they not being a CORPORATION or a COMPANY, and there being no law of the State granting franchise rights to individuals. On February 1, 1892, Gans and Wilson had only a contract for ten years, with the Village of Orrville, because the Village of Orrville had no power to grant a franchise to use the streets of the Village beyond the time necessary to carry out the contract of ten years named in that ordinance. The ordinance of February 1, 1892 would have been just as valid and have conferred as much power upon Gans and Wilson if it had been silent as to the right to use the streets, lanes and public places of the Village,

because a contract to light the streets implied a right to use the streets for the erecting of poles, wires and electrical equipment for that purpose. For instance: Notice the total lack of express authority to use the streets in the subsequent ordinances of the Village of Orrville, that of 1902, 1907, and 1912. We mean by this argument that the statement in the first ordinance, February 1, 1892, was an express authority for the use of the streets for the ten-year period, whereas, if there had been no such express authority granted, an implied authority was granted in it. So that, starting out with the first ordinance, that grant to Gans and Wilson, because of the state of the laws existing at that time, was a mere right to use the streets for ten years to carry out their contract and that ordinance granted no further right and authority because the Village had no higher power than that granted in said ordinance to use the streets; that is, the grant to Gans and Wilson at that time was limited to the purposes of carrying out the contract to light the streets for ten years, and while it was expressly granted, it was not necessary to *expressly* grant the same.

While we are talking about the ordinance of February 1, 1892, we wish to state that the only thing contemplated in said ordinance from the words of the ordinance itself taken as a whole, was the public lighting of the streets; commercial lighting, furnishing heat and power were not expressly mentioned. This ordinance in itself, as claimed by the plaintiff in error created a contract between the Village of Orrville and Aurel P. Gans and Mellville D. Wilson; while we maintain that it had a duration of time fixed within it, to-wit, ten years; that the Village had no power at that time to grant an ordinance for a longer period; that it exercised its authority, which was to give to Gans and Wilson a contract to light the streets and expressly said that they could use the streets for that purpose; and that

the Village had no power to grant more rights or give greater rights to these two individuals than it did, because at that time the State had fully retained all power to grant franchises to corporations and companies and Gans and Wilson being neither a corporation nor a company had obtained no rights from the State.

### **CONSTRUCTION OF THE CONTRACT.**

The ordinance of February 1, 1892 between the Village of Orrville and Gans and Wilson, as claimed by the plaintiff in error was a contract existing between the Village of Orrville and Aurel P. Gans and Mellville D. Wilson, and assuming for the purposes of argument and to meet the argument of the plaintiff in error. We want it understood that we are not accepting the claim of the plaintiff in error or agreeing thereto, but for the above purposes, we wish to take up the claim of the plaintiff in error:

**FIRST:** We claim it did have its terms of duration fixed, to-wit, ten years.

**SECOND:** We believe the following rules of law govern the construction of contracts:

- (1) The wording of the contract itself.
- (2) The surrounding facts and circumstances.
- (3) The valid subsisting laws and decisions of Courts in effect in the State at the time the contract is entered into.

All these elements must be taken into consideration in determining under the common law what the contract means. It is the way arrived at by the Courts to determine the intention of the parties.

Taking up these separate propositions, we wish to state as follows:

(1) *Section 3* of said ordinance states as follows:

“In consideration of the privileges hereby granted, said Gans and Wilson, their associates, successors and assigns shall furnish the Village of Orrville on the several streets, lanes, alleys and avenues not less than twenty-five (25) electric lamps” etc.

*Section 4* of said ordinance states as follows:

“In consideration of the construction of said electric light plant as herein provided, the council of said Village of Orrville hereby agrees and binds itself to take and use the light of said Gans and Wilson, their associates, successors and assigns, for the period of ten years from and after the date upon which said light shall be first supplied, and to pay same” etc.

*Section 6* of said ordinance states as follows:

“The PRIVILEGE hereby conferred and the obligations incurred shall not be forfeited for any temporary failure” etc.

*Section 7* of said ordinance states as follows:

“Said Gans and Wilson agree to accept this ordinance \* \* \* their acceptance, together with the ordinance, shall constitute a contract.”

We think it clear from the sections above quoted that the Village of Orrville, in consideration of the rights granted to these two individuals agreed to allow them, their associates, successors and assigns, to operate in lighting the streets of the Village of Orrville for ten years. Unless the agreement to accept their lights for the period of ten years was the full consideration there was no consideration moving from these two individuals, grantees, to have a perpetual franchise or a franchise beyond the period of said ten years. It is hardly to be conceived that the Village of Orrville was granting two separate definite rights to

said two individuals, one a contract to light the streets for ten years, at which time the Village retained the right to let a contract to any other person or company to continue lighting the said streets under a new and different separate contract, and a perpetual right to occupy the streets, lanes, alleys and public places in said Village forever. There was no occasion to grant such a right; there was no consideration for such a last mentioned right.

(2) The surrounding facts and circumstances existing on February 1, 1892 were: That the said Village of Orrville was a small, rural village; that electric lighting was being established in cities and villages from a local electric manufacturing plant located at the place of distribution of the electricity, to-wit, in the village itself; and that the ordinance granted to these two individuals a right to use the streets for lighting the streets for a period of ten years, the said grantees to furnish certain specified number of lights at a certain fixed price per light, this to continue for ten years, which was the period fixed by the statutes of Ohio at said time as the longest period that such a contract could be entered into by a Village.

Can it be conceived that it was the intention of the parties, the Village of Orrville, when said ordinance was granted, February 1, 1892, that it was in their minds or could be contemplated to be in their minds that they were giving to these two individuals, not a great public service corporation, a contract ordinance to light the streets for ten years and at the same time a perpetual right to use the streets for this purpose and especially for commercial and private lighting, when the ordinance was silent as to commercial and private lighting, and the ten-year limitation in the contract part of said ordinance itself implying that at the end of said ten-year period the council of said

Village might grant a contract for ten years more to some totally different parties? Can it be conceived that the Council of said Village of Orrville was granting a franchise right forever to these two individuals that would run and bind generation after generation of the people of Orrville, tying their hands and imposing an obligation upon the Village, for which right there was no consideration being received at the time?

On the other hand, can it be conceived that these two individuals thought that they were getting a perpetual right in the streets of the Village of Orrville when they knew that their contract was limited to ten years and when they knew that there was no legal obligation on the Village to renew a contract with them, or any successor or assign that they might have, and when so far as the facts existed on said February 1, 1892, that that was the last contract they might ever receive from said Village, or that their assigns or successors might ever receive, although ten, twenty, forty, fifty, one hundred, two hundred or five hundred years might elapse?

(3) When this contract of February 1, 1892 was entered into between the Village of Orrville and said two individuals, Gans and Wilson, grantees, the laws of Ohio were as we have above stated, by which the Village only had the power to consent to the use of its streets, that is as to the location of poles, wires, guy wires, as to where the equipment of the grantees could be located; and the Village had no power at that time under the laws of Ohio to grant any further rights to said grantees.

**CONTRACTS IN DEROGATION OF PUBLIC RIGHTS  
STRICTLY CONSTRUED IN FAVOR OF THE  
PUBLIC AND AGAINST THE GRANTEE.**

In the construction of this contract we wish to call the Court's attention to what the Supreme Court of the State of Ohio has stated:

Vol. 52 O. S. R., page 262, *R. R. Co. vs. Defiance*, 5th and 6th syllabus,

the Court says as follows:

"5. The powers conferred on municipal corporations with respect to the opening, improving, and repairing of their streets and public ways, are held in trust for public purposes, and are continuing in their nature, to be exercised from time to time as the public interests may require; and they cannot be granted away, or relinquished, or their exercise suspended, or abridged, except when, and to the extent legislative authority is expressly given to do so;"

"6. Every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restrictive of the control of the proper agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant."

**INTENTION OF PARTIES IN  
CONSTRUCTION OF CONTRACT,  
AMOUNT OF MONEY INVOLVED.**

In the trial of this case in the Ohio courts plaintiff in error relied with great confidence on the case of

*Northern Ohio Traction and Light Co. vs. State ex rel. Pontius*, 245 U. S., page 574.

We notice that they do not seem to rely so much upon that case in their brief in this Court. We will comment on that case later on.

This is not a case where vast sums of money were to be invested in permanent fixtures, but a ten-year contract on the basis named in said ordinance of February 1, 1892. This contract for ten years at the price fixed per lamp must have been contemplated by at least Gans and Wilson to fully repay them for the establishment of the electric light manufacturing plant, and the erection of poles and the installation of electrical equipment, because they had at that time no assurance that they would receive another contract from the said Village of Orrville at the end of the ten-year period. Gans and Wilson had no right to assume that they would have a renewal of the contract at the end of the ten-year period but they must have contemplated that they would make money and not lose money by virtue of said ten-year contract and their ability to sell for a fair price their tangible property to a further contractee with said Village as contractor after said ten-year period. This must have been in the contemplation of the parties at the time the ordinance was granted, February 1, 1892.

This is not a case where vast sums of money were invested and would necessitate great and irreparable loss to anyone, to-wit, the plaintiff in error, if the contract and the right to use the street was entirely abrogated by the Courts or by the acts of the parties themselves.

Defendant in error claims that this contract should be interpreted and construed according to the rules of law governing contracts between individuals where no time is fixed for the expiration of the contract, that is, that the intention of the parties must prevail as to how long said contract shall subsist. This intention is determined from the contract itself and from the surrounding facts and circumstances, and the laws subsisting at the time.

In the *N. O. T.* case, 245 U. S., page 574, which case arose in a neighboring county to us, we are not unmindful of the reason given by the Supreme Court for the holding of the contract between the Commissioners of Stark County and said Street Railway Company to be a contract perpetual in its existence and we concur in the reasoning of this Court in that case. This Court in said case interpreted the contract in the light of the circumstances and said on page . . . . . as follows:

"It is not to be considered that the parties contemplated the right to terminate this contract at will, or that people would invest huge sums of money in said street railway with the right retained by the Commissioners to terminate it at will."

We hold this case in 245 U. S., page 574, is right in principle and that that principle applies to the case at bar, but that the facts are so different that the decision in said 245 U. S., page 574, cannot be followed in the case at bar, because of the difference in facts.

In the case reported in 245 U. S., page 574, the facts are as follows:

That a stretch of street railway between the City of Canton and the City of Massillon, Stark County, was but a link in a street railway running from Cleveland, probably one hundred miles to the Southeast portion of the State, from Cleveland to Akron, Canton, Massillon, New Philadelphia, and other large cities. That millions of dollars had been expended in building said line and were invested at the time; that the franchise was attempted to be taken from the railway company and their rights declared terminated.

In the case at bar the evidence shows: That plaintiff in error, The Ohio Public Service Company, is engaged

in conducting electricity from distant states, Maryland, and West Virginia, through Wheeling, to Massillon, Ohio, with many branches and side lines lighting cities and villages, furnishing light, heat and power; that from Massillon the line proceeds westward, not through the Village of Orrville but outside of said corporation, to the south thereof, and proceeds westerly and supplies the electric lighting of numerous villages and cities, including the City of Wooster; that its sub-station is outside the Village of Orrville and that its lines into the Village of Orrville are loop a loop (Record in Case 264, page 81); that it now has invested, or had at the time this suit was heard to the Court of original jurisdiction, the Court of Appeals of Wayne County, Ohio, but a small sum of money, the total appraisement thereof not to exceed \$12,000.00, with reductions reducing it probably to about \$1200.00 (Record in Case 264, pages 69 and 76); that the said plaintiff in error has about twenty-five or twenty-six customers for commercial lighting in said Village of Orrville (R. p. 44); and that its system, poles and wires, are in a dilapidated and abandoned condition, many poles without any arms, many poles taken down and blown down by storms, insulation hanging from wires, several feet long; and that their equipment is old-fashioned and useless (Record in case 264, pages 77 and 79). All this is determined by the testimony of George Martin, an expert in his line, and it is admitted by the plaintiff in error that his testimony is true (see Record in case 264, page 67). The testimony of George Martin is short and we refer the Court to the same. There was no evidence offered by the plaintiff in error on the trial of this case to controvert the testimony of George Martin.

This statement of facts clearly takes the case out of the principle announced in

*N. O. T. vs. State ex rel. Pontius*, 245 U. S., page 574.

## **COMMERCIAL AND PRIVATE LIGHTING UNDER ORDINANCE OF FEBRUARY 1, 1892.**

The original ordinance of February 1, 1892 was silent as to commercial or private lighting, and, as has been held by Courts of Ohio, was a mere incident to the public lighting. See:

Record in Case 264, page 29, Court of Appeals Opinion.

Vol. 113 O. S. R., page 325, Supreme Court of Ohio.  
25 C. C. N. S., page 48, last paragraph, *Huss vs. Ry. & Lighting Co.*

We cannot see how an argument can be based upon the idea that the Village of Orrville was granting a perpetual right to furnish commercial or private lighting to the Village of Orrville forever in perpetuity, when the original ordinance granting their rights was silent on that subject. We claim that the right to furnish commercial or private lighting was a mere incident to the public lighting, and ceased when that right ceased; that the incident of the attachment to the main body died, when the main body died.

## **THE STATUS OF THE ORRVILLE LIGHT, HEAT & POWER COMPANY.**

In 1893 The Orrville Light, Heat & Power Company was incorporated by the State of Ohio, and at that time was endowed, by virtue of said incorporation, with the right to use the streets and alleys and public places of municipalities, including the Village of Orrville, for the erection of poles, wires, and electrical equipment. It was endowed by the State with all the power that the State had at said time, which was as above, it not having yet delegated any authority to the municipalities themselves. This was done later, on April 23, 1896.

The Orrville Light, Heat & Power Company claim to have taken over from Gans and Wilson all the rights they had by virtue of said ordinance of February 1, 1892. All the rights that Gans and Wilson had, as we have above stated, were to light the streets for a period of ten years and incidentally to furnish private or commercial lighting during said same period.

Gans and Wilson had no power to assign anything more than the ordinance of February 1, 1892 had granted to them, which was *not* the right granted by the State of Ohio to a *corporation*, but a *contract* right granted by the Village to them. So that, when in 1893 The Orrville Light, Heat & Power Company began business in Orrville they were working under two separate rights:

1. The right granted by the State to it as a corporation to occupy the streets of said Village; and,
2. The right to furnish public, and incidentally public, lighting by virtue of the assignment to them by Gans and Wilson of their rights under said ordinance of February 1, 1892.

These two rights continued uninterrupted, unrevoked and unimpaired until the expiration of the ten-year contract, to-wit, in 1902.

In the meantime, in 1896, April 21st, the State of Ohio delegated, by an Act of that date, to the Village of Orrville, the power to control alone its streets. This Act did not affect the rights of The Orrville Light, Heat & Power Company which had vested previous to this Act. It did not affect the right of The Orrville Light, Heat & Power Company to carry out the contract of Gans and Wilson, that was a fixed and vested right. This Act of April 21, 1896 could not and did not deprive The Orrville Light, Heat & Power Company of authority granted by the State of

Ohio before that time to occupy the streets of the Village of Orrville for electric lighting purposes, by virtue of its incorporation. This Act was not retroactive and could not be; the State had no power to violate the contract existing or to revoke the rights granted, which said rights had become vested in The Orrville Light, Heat & Power Company.

In 1902 the Village of Orrville, without reference to any former ordinance or contract, granted by contract ordinance to The Orrville Light, Heat & Power Company a right to light the streets of the Village of Orrville for a period of five years, and also in said ordinance provided for commercial lighting and the price to be paid therefor by the private individuals of said Village. This contract was completed by both parties and expired in 1907. Just before the expiration of this contract another contract, to begin at the expiration of said contract, with The Orrville Light, Heat & Power Company, in 1907, was entered into by ordinance of said Village, with an individual, one D. I. Rennecker, for furnishing lights for said Village streets and public places, fixing the price thereof, and providing for commercial and private lighting to the inhabitants of said Village, and fixing the price thereof, nothing being said whatever as to any former ordinance or right granted to anyone. Nothing was said in the ordinance of 1906, to David I. Rennecker, as to the right to use the streets, nothing expressly said, but to carry out the contract between the Village of Orrville and said D. I. Rennecker, the use of the streets was necessarily implied for the period of time stated in said ordinance. At no time after said April 21, 1896, did the Village of Orrville grant to anyone any right beyond a fixed period, and that only by implication, to use the streets, for public or private lighting purposes, so that the said D. I. Rennecker only had from the State of Ohio or the Village of Orrville a contract for a period of five years, expiring in 1912.

**WHAT RIGHTS DID THE ORRVILLE LIGHT,  
HEAT & POWER COMPANY ASSIGN  
AND HAVE THE RIGHT TO ASSIGN  
TO D. I. RENNECKER? WE CLAIM NONE.**

Right at this point it is claimed by the plaintiff in error that The Orrville Light, Heat & Power Company had assigned all the rights that they possessed to the said D. I. Rennecker, to carry out an uncompleted contract of The Orrville Light, Heat & Power Company. The Record, pages 54, 55, 60 and 62, in Case No. 264, shows that thereafter The Orrville Light, Heat & Power Company made a dividend of its assets among its stockholders and went out of business and ceased to exist. So that, The Orrville Light, Heat & Power Company surrendered back to the State of Ohio any power or authority which it may have had to the use of the streets and alleys of the Village of Orrville, unless they could legally transfer the same to said D. I. Rennecker and did do so. We claim that The Orrville Light, Heat & Power Company had no power to assign an uncompleted contract carrying with it the rights they possessed as a corporation, from the State, and transfer the same and endow a private individual with said rights.

*12 Ruling Case Law, Sec. 43, pages 217 and 218:*

"It is now settled by an overwhelming weight of authority that public or quasi public corporations, which owe duties to the public as well as to their stockholders, have no right to transfer their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. It is the duty of gas companies, water companies, electric companies, telegraph and telephone companies, and all similar corporations, which have obtained the right to use the public streets for the erection or extension of their . . . . . to serve the public faithfully and impartially, and at reasonable

rates. This is a duty the performance of which may be enforced by the courts. And unless authority has been granted by the legislature an attempted transfer of its franchise by such a corporation is wrongful. Such franchises are, in the absence of express statutory authority deemed to be non-transferable, for the reason that they constitute public trusts, carrying with them the duty of the performance of such trusts, and hence that liability for the performance of duty cannot be cast exclusively upon another, unless with the consent of the sovereign. It is not to be understood, however, that an attempted transfer is *ipso facto* void; on the contrary, the transfer will be treated, ordinarily, as valid and effectual until attacked by the sovereign grantor in a direct proceeding instituted for the purpose."

Also:

*Zanesville vs. Telephone Co.*, 64 O. S., page 67;  
*Telephone Co. vs. Cincinnati*, 73 O. S., page 77;  
*Coe vs. R. R. Co.*, 10 O. S. R., 372, syl. 1;  
*Brunswick Gas Light Co. vs. United Fuel, Gas & Light Co.*, 35 A. S. R., page 385, 1 syl., and page 403 bottom note.

In 1912 when the Village of Orrville granted a contract to light the streets of said Village to D. I. Rennecker, and providing for commercial lighting, this was a new and independent contract with an individual, to-wit, D. I. Rennecker. This ordinance of 1912 with said Rennecker did not mention or grant in express language the right to use the streets of said Village, to said Rennecker. It did provide the lighting of the streets by said Rennecker and the furnishing of commercial lighting and incidentally and as a matter of necessity to carry out said contract, it impliedly granted the right to use the streets for the erection of poles, wires and electrical fixtures. This contract

was for five years, and to expire July 15, 1917. Neither the State of Ohio nor the Village of Orrville had granted to said Rennecker in 1912 any other right than that set forth in said contract of 1912 to said D. I. Rennecker, and this said contract with D. I. Rennecker to begin in 1912 was to the said Rennecker as an individual and to him alone and not to his successors or assigns,

(See copy of said ordinance, Record page 188 in Case No. 264),

and does not provide for the assignment of said rights in said ordinance to anyone.

This said ordinance to D. I. Rennecker began in 1912, was passed by the council of the Village of Orrville on the 12th of March, 1912, and was entered upon at the proper time by the said D. I. Rennecker, who continued to carry out said contract until the year 1913, when he attempted to assign it to The Massillon Electric and Gas Company.

We challenge the right of said D. I. Rennecker, an individual, to assign, sell or transfer to The Massillon Electric and Gas Company any rights granted to him by said ordinance of March 12, 1912, and to begin in 1912.

First: This was a contract between the Village of Orrville and said D. I. Rennecker alone, who was an individual and not a company or corporation.

Second: Said ordinance of March 12, 1912, did not provide for an assignment by the said Rennecker, it was not to him, his successors and assigns. The consent of the Village of Orrville was never obtained by the said D. I. Rennecker to assign said right to The Massillon Electric and Gas Company. It is true The Massillon Electric and Gas Company did complete the contract of five years—term ending July 15, 1917. The said D. I. Ren-

necker had obtained no rights whatever from the State of Ohio and the act of the Public Utilities Commission in allowing said Rennecker to sell was an act *ultra vires* in the said Public Utilities Commission, because they had no such power to determine whether or not the said Rennecker had a franchise; they had no power to hold or to decide upon the rights or controversies between the said Village of Orrville and said D. I. Rennecker; and, as we take it from the brief of the plaintiff in error, plaintiff in error is not now relying upon any action of the Public Utilities Commission as conferring any rights or authority upon them to the use of the streets, alleys and public places of the Village of Orrville to furnish commercial lighting to the inhabitants of said Village.

We cite:

*New Bremen vs. Ohio Public Utilities Commission*,  
Vol. 103, pages 23, 30 and 3 of the Supreme  
Court of Ohio,

determining the jurisdiction of the Public Utilities Commission of Ohio.

**RIGHT TO TERMINATE A CONTRACT  
WHICH CONTAINS NO LIMIT  
OF EXPIRATION.**

This being a contract, on the claim of the plaintiff in error that the ordinance of February 1, 1892 was a contract between the Village of Orrville and Aurel P. Gans and Mellville D. Wilson, their associates, successors and assigns, which rights of the said Gans and Wilson have descended by proper and legal assignments to the plaintiff in error, The Ohio Public Service Company; if this is true, now we claim the right in said Village of Orrville to terminate said contract under and by virtue of the laws of the

State of Ohio and the decisions of the Supreme Court of the State of Ohio, to-wit:

*East Ohio Gas Co. vs. City of Akron*, 81 O. S. R., page 33.

*East Ohio Gas Co. vs. City of Cleveland*, 106 O. S. R., page 489.

Assuming further, that the said contract is as claimed by the plaintiff in error indeterminate in its duration and that said contract provides for no period of the expiration of itself, we claim that it is a contract terminable at the will of either party.

We further claim, that said Village of Orrville, on April 18, 1923, by a repeal of said ordinance of February 1, 1892, and notice of the same to the said plaintiff in error, The Ohio Public Service Company, terminated said contract and that the same is now null and void.

**HARDIN-WYANDOTTE LIGHTING COMPANY  
VS.**

**THE VILLAGE OF UPPER SANDUSKY,  
REPORTED IN VOL. 93 O. S. R., page 428;  
AFFIRMED IN VOL. 251 U. S., page 173.**

This case is frequently quoted and largely relied upon by plaintiff in error to sustain its contention in the case at bar, (Plaintiff in Error's Brief, pp. 12, 39, 40, 51, 56, 70, 92, 14, 40, 55, 70, 84 and 92).

This case does not sustain the contention of the plaintiff in error for the following reasons:

(1) It is a case brought by the VILLAGE of Upper Sandusky challenging the right of an electric company to occupy its streets by virtue of an ordinance of said Village and the Act of April 21, 1896, 92 O. L., page

204, General Code Sec. 91...., and on the further ground that said Company had abandoned the streets and alleys and public places of said Village.

It was a prayer for injunction.

(2) This case did not attack the franchise from the State of Ohio to said Company.

The case at bar is an action in quo warranto by the STATE OF OHIO, attacking a claimed state franchise of plaintiff in error to operate in the streets of the Village of Orrville.

In the case at bar the contention is made by defendant in error that the Company never obtained the consent of the Village of Orrville to occupy the streets; that if the Company had a contract with said Village of Orrville by virtue of the ordinance of February 1, 1892, it was indeterminate in its period of duration subject to be determined by the Village of Orrville and was so terminated by ordinance of said Village of Orrville passed June 18, 1923.

The plaintiff in error answers these contentions of the defendant in error by stating that The Orrville Light, Heat & Power Company obtained a franchise from the State of Ohio in 1893, which by its incorporation gave it the right to occupy said streets; that they are the legitimate and legal successors in title of said The Orrville Light, Heat & Power Company by assignment in chain of title from one The Massillon Electric and Gas Company, who in turn were in chain of title the assignees of one D. I. Rennecker, who claimed to succeed to the title by assignment from said The Orrville Light, Heat & Power Company.

In the case at bar the defendant in error denies the right of assignability of any franchise rights to the plaintiff in error.

Plaintiff in error claims to be the assignee of Gans and Wilson, who they claim received perpetual franchise rights by virtue of the ordinance passed February 1, 1892, which through the chain of title were assigned to the plaintiff in error through the same method as above stated, which right to assign is denied by defendant in error.

Also, plaintiff in error maintains in the case at bar that the Act of the Legislature of the State of Ohio of April 21, 1896, 92 O. L., page 204, now G. C. 91...., is unconstitutional and void because it impairs a contract already vested in said plaintiff in error before said date.

In the *Hardin-Wyandotte* case no question of assignability of contract or franchise was involved or passed upon by any court. The state franchise granted in the *Hardin-Wyandotte* case was not attacked. The question of consent of the municipality being necessary for the Hardin-Wyandotte Company to re-establish its system was directly attacked; that same question is involved in the present case. The Supreme Court of the United States in

Vol. 251 U. S., page 173, at the end of the Opinion, page 179,

declares said Act of April 21, 1896 did not impair a previous contract and was not therefore unconstitutional.

Respectfully submitted,

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